No. 245.

FILED
OCT 2 1900
JAMES H. McKENNEY,
Clerk.

Brief of Estabrook for Petitioners.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

Filed Oct. 2, 1900.

No. 245.

HENRY CLEWS, CHARLES M. FOSTER AND JAMES B. CLEWS,

Petitioners,

vs.

MALCOLM M. JAMIESON, ROLAND C. NICKERSON, HARRY F. BILLINGS, EDWIN G. FOREMAN, CHARLES HENROTIN ET AL.,

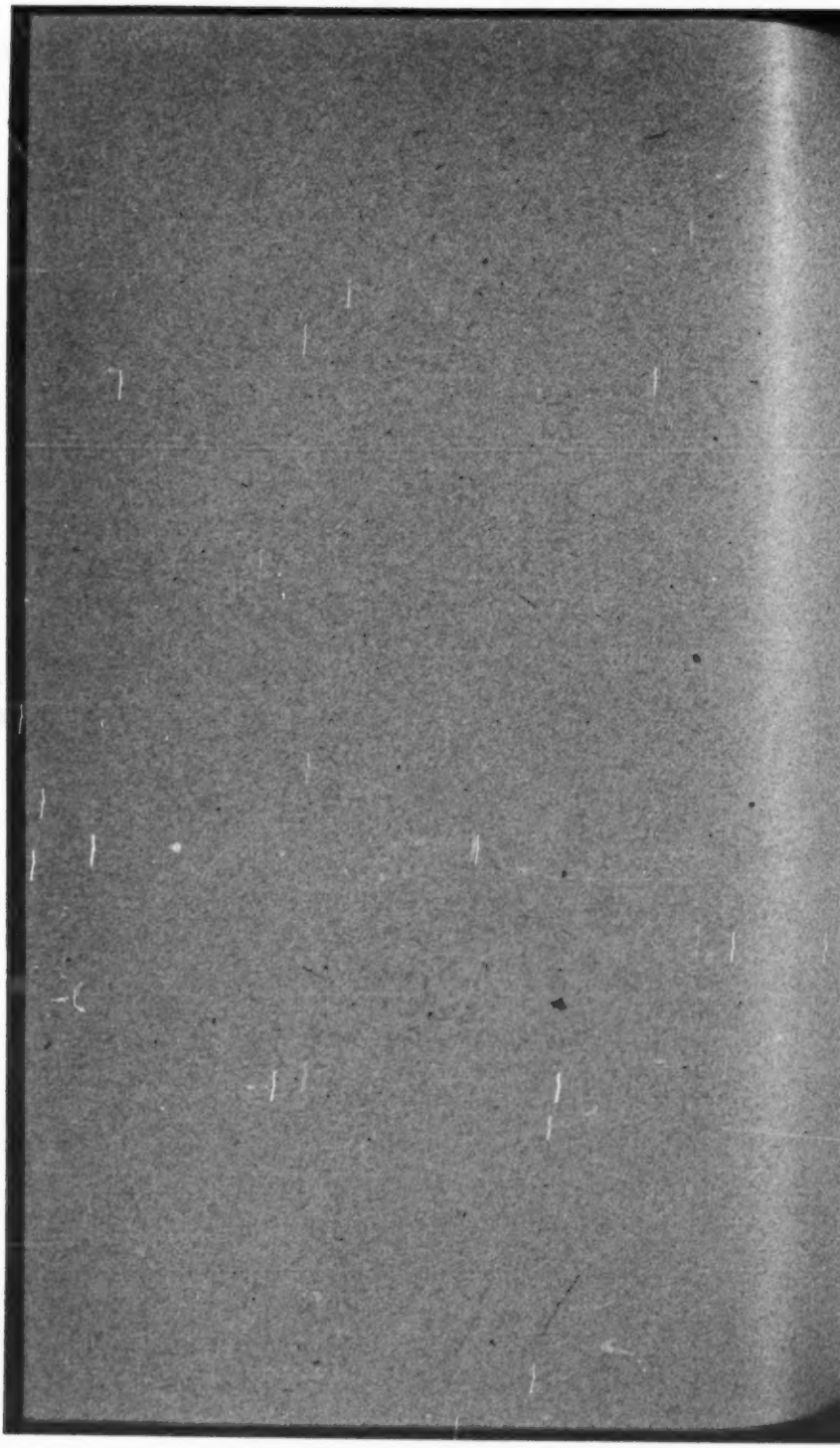
Respondents.

BRIEF FOR PETITIONERS.

MR. FRANK O. LOWDEN,
MR. HENRY D. ESTABROOK,
MR. HERBERT J. DAVIS,
Counsel for Petitioners.

MR. HENRY D. ESTABROOK,
Of Counsel.

On writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, to review a decision affirming a decree of the Circuit Court of the United States for the Northern District of Illinois, Northern Division, dismissing petitioners' bill for want of equity.



IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 245.

HENRY CLEWS, CHARLES M. FOSTER AND JAMES B. CLEWS,
Petitioners.
vs.
MALCOLM M. JAMIESON, ROLAND C. NICKERSON, HARRY F. BILLINGS, EDWIN G. FOREMAN, CHARLES HENROTIN ET AL.,
Respondents.

BRIEF AND ARGUMENT.

STATEMENT OF ISSUES.

This suit in equity was brought by the petitioners, Henry Clews & Company, to have administered and turned over to them fourteen thousand dollars in the possession of the managers of the Chicago Stock Exchange, claimed by petitioners to have been deposited in trust as security for the performance of a contract, entered into August 3, 1896, whereby the petitioners agreed to sell and deliver, and the respondents, Jamieson & Company, agreed to receive and

pay for, on the thirty-first day of August, 1896, seven hundred shares of the stock of the Diamond Match Company; which contract, it was alleged, Jamieson & Company failed and refused to perform. Petitioners' bill also asked for an accounting of the loss and damages sustained by them on account of the breach of contract, and that Jamieson & Company be decreed to pay the amount ascertained.

It was contended by the respondents, Jamieson & Company:

1. That the contract sued upon was in reality a contract between Jamieson & Company and Schwartz, Dupee & Company, a firm of brokers, to which the petitioners, Henry Clews & Company, were not parties and upon which they ought not to recover for want of privity.

2. That the contract sued upon was made through the clearing house of the Chicago Stock Exchange and according to the rules, customs and regulations of said exchange, which said rules provided, among other things, a remedy for breach of every contract made subject thereto, and that the remedy so provided was exclusive.

3. That the testimony offered by petitioners, Henry Clews & Company, proved, at most, nominal damages only.

4. That a bill in equity would not lie, the petitioners having an adequate remedy at law.

The fourth issue specified was raised on demurrer to the bill, which demurrer was overruled and the case was sent to a master to report his findings of fact and conclusions of law. The master's report found all the issues in favor of the petitioners, Henry Clews & Company, and that there was due them from Jamieson & Company, $64,400. On exceptions to the master's report, and certain new evidence stipulated into the record, the trial judge dismissed the bill of petitioners for want of equity, although his written

opinion, set forth in the record, bases the decision solely on the ground of want of privity.

5. On appeal to the United States Circuit Court of Appeals for the Seventh Circuit, the decision of the Circuit Court was affirmed, *not on the only ground which formed the basis of the opinion of that court, nor upon any issue raised by the pleadings or argued in the brief of counsel for respondents*, but because, in the opinion of the Circuit Court of Appeals, the transaction was a gambling transaction and therefore void; leaving petitioners to recover from the stock exchange, as best they might, their money on deposit.

STATEMENT OF FACTS AND COMMENTS THEREON.

The petitioners, citizens and residents of the State of New York, at the time of the bringing of their bill against the respondents were, and for many years prior thereto had been, engaged, as copartners under the firm name of Henry Clews & Company, in doing business in the city of New York, buying and selling stocks, bonds and other securities. The respondents, Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings, were at the time citizens and residents of the State of Illinois, doing business as a copartnership, under the name of Jamieson & Company, buying, selling and exchanging bonds, stocks and other securities, and also doing a general brokerage business for the purchase and sale of like properties in the city of Chicago. The respondents, Gustavus A. Schwartz, John Dupee, John W. Conley and Isaac J. Bloom, were a copartnership under the firm name of Schwartz, Dupee & Company, engaged in like business in the city of Chicago. The other respondents constituted the governing committee of the Chicago Stock Exchange, an association formed for the purpose of opening an exchange in the city of Chicago, where its members could

meet together and buy and sell such stocks and securities as should be listed with the said exchange, and where its members could make contracts for such sales and purchases under the rules and customs of said exchange.

The contract of August 3, 1896, here sued upon, was in terms between the said Schwartz, Dupee & Company and the respondents, Jamieson & Company, members of the Chicago Stock Exchange; Clews & Company claiming that in entering into the contract Schwartz, Dupee & Company acted as their agents. The contract is evidenced as follows:

On August 3, 1896, the manager of the clearing house sent to Schwartz, Dupee & Company, members of the Chicago Stock Exchange, a CLEARING HOUSE SHEET, reading as follows:

CHICAGO STOCK EXCHANGE CLEARING DEPARTMENT.

CHICAGO, Aug. 3, 1896.

Schwartz, D. & Co.:

Tr. p. 106. We have settled all trades on your sheet this day, with the following exceptions, which have been substituted:

Bought.	Sold.	Stock.	Price.	Substitution.
	50	W. Ch'go.	103¾	Wilson & S.
	150	" "	103¾	Wasmansdorff.
	1150	*Match.*	*222*	*Jamieson & Co.*
	100	Bisc.	92	Breese & Co.
	550	"	92	Spencer.

The manager at the same time sent a CLEARING HOUSE SHEET to Jamieson & Company reading as follows:

CHICAGO STOCK EXCHANGE.

Clearing Department.

CHICAGO, August 3, 1896.

Tr. p. 95. *Jamieson:* We have settled all trades on your sheet this day with the following exceptions, which have been substituted:

25159

Bought.	Sold.	Stock.	Price.	Substitution.
	1150	M.	222	Schwartz.

On the same day Schwartz, Dupee & Company delivered to Jamieson & Company a TRADING CARD reading as follows:

CHICAGO, Aug. 3, 1896.

M. Jamieson & Co.

We hereby confirm *sales* made by us for the account to-day under the rules of the Chicago Stock Exchange, also substitution trades. Tr. p. 118.

Amt.	Kind of Property.	Price.
	Substitution Trades. Sold.	
1150	Match.	222
	Difference { Collect	287 50
	Pay	

SCHWARTZ, D. & Co.

The same day Jamieson & Company delivered to Schwartz, Dupee & Company a TRADING CARD reading as follows:

CHICAGO, Aug. 3, 1896.

M. Schwartz:

We hereby confirm *purchases* made by us for the account to-day under the rules of the Chicago Stock Exchange, also substitution trades. Tr. p. 118.

Amt.	Kind of Property.	Bought.	Price.
	Substitution Trades.		
1150	D. Match.		222
	Difference { Collect		
	Pay		287 50

JAMIESON & Co.

EXPLANATION: The words "FOR THE ACCOUNT" used in the foregoing documents are technical words. DISASSOCI- Tr. p. 34, clearing house rules, Sec. 2.

ATED FROM THE STOCK EXCHANGE THEY HAVE NO MEANING WHATEVER. FOR A CLIENT TO ORDER A SALE "FOR THE ACCOUNT" MEANS, THEREFORE, AN ORDER TO SELL ON THE STOCK EXCHANGE, AND NECESSARILY IMPLIES A KNOWLEDGE ON THE PART OF THE CLIENT OF THE RULES, USAGES AND CUSTOMS INVOLVED IN CARRYING OUT HIS INSTRUCTIONS. THE WORDS "FOR THE ACCOUNT" mean that the shares of stock bought or sold are to be delivered on the account day, *which, under the rules of the exchange would be the last day of the current month.*

Idem, Sec. 1.

All trading for "the account" in securities listed on the Chicago Stock Exchange (*i. e.*, every contract for future delivery), must be under the rules of the clearing house.

Idem, p. 36, Secs. 12 and 17.

On all trades for "the account" the buyer and seller are each required to deposit with the stock exchange clearing house a "margin" of $10 per share on all stocks selling at $100 or over per share, as a trust fund to secure the mutual performance of the contract entered into.

Tr. p. 33, Art. 16 of the by-laws, Sec. 1; also §§ 2-6, p. 34.

This trust fund is at all times to be kept unimpaired *regardless of the fluctuations of the market*, to do which necessitates additional deposits from one of the parties to the contract from day to day, and of course justifies the other party in withdrawing from such fund an amount equal to the deposit.

ILLUSTRATION: A agrees to sell and B to buy 700 shares of Diamond Match stock at $223 per share. They each deposit $7,000, *i. e.*, $10 per share. The day following the making of this contract, however, the market price of Diamond Match falls to $222 per share. A's contract, therefore, is potentially worth $1 a share less, and B's is potentially worth $1 a share more than on the previous day. To make good his security, A thereupon deposits $1 per share, *i. e.*, $700, in the trust fund. B, who is only required to keep his security unimpaired, thereupon withdraws $1

Tr. p. 118, testimony of Wilkins, Mgr. of the Exchange.

per share, *i. e.*, $700, from the trust fund. If on the following day the market returns to $223, B deposits $1 per share, *i. e.*, $700, and A withdraws $1 per share, *i. e.*, $700.

This illustration also explains the meaning of the words and figures opposite the words "pay" and "collect," in the foregoing trading cards. The card signed Jamieson & Company indicates that Jamieson & Company were required to pay $287.50 into the trust fund to make good their margin, and the card signed Schwartz, D. & Co. indicates that Schwartz, D. & Co. were at liberty to withdraw from the trust fund $287.50. It is apparent that the figures $287.50, register the fluctuations of the market during the preceding twenty-four hours.

THERE IS NO DISPUTE AS TO THE MEANING OF THESE DOCUMENTS.

Mr. Wilkins, manager of the stock exchange, asked to translate these cards, says, as to the one signed S. D. & Co.: "That card would show that they [Schwartz, Dupee & Company] had no sales and they accepted the *substitution* which I had given them for 1150 shares of Match at 222, and they [Schwartz, Dupee & Co.] *collected* $287.50." Tr. p. 118.

As to the card signed Jamieson & Company, Mr. Wilkins says: "That is exactly the same as exhibit 6, except that they [Jamieson & Company] *paid* $287.50. * * * That is, Jamieson & Company say that they have bought 1150 shares of stock at 222 and *paid* $287.50; Schwartz, Dupee & Company say that they have sold 1150 shares of Match at 222 and *collected* $287.50; that balances the stock and balances the money." Idem. p. 118.

One further explanation is perhaps called for at this time, to be more fully developed hereinafter, as to the meaning of the words "SUBSTITUTION TRADES." Their meaning is indicated in the testimony of Mr. Wilkins quoted. The

cards show that neither Schwartz, Dupee & Company nor Jamieson & Company had made any new original sales on August 3, 1896; that the 1150 shares of Diamond Match stock bought and sold by them *had been so bought and sold prior to August 3, 1896.* They further indicate that the persons, *members of the exchange*, to whom Schwartz, Dupee & Company had *theretofore* sold 1150 shares of Diamond Match stock might be, and probably were, other than Jamieson & Company; and that the persons from whom Jamieson & Company had *theretofore* purchased 1150 shares of Diamond Match stock might be, and probably were, other than Schwartz, Dupee & Company, *but that irrespective of who such former buyers and purchasers were, the manager of the exchange had novated the contract* by substituting for the persons purchasing from Schwartz, Dupee & Company, *whoever they might be*, Jamieson & Company, and by substituting for the vendors from whom Jamieson & Company had purchased, whoever they might be, Schwartz, Dupee & Company, *and that both Schwartz, Dupee & Company and Jamieson & Company had assented to the substitution*, THEREBY CANCELING ALL FORMER CONTRACTS WITH WHOMSOEVER MADE AND AT WHATSOEVER PRICE, AND ENTERING INTO A NEW CONTRACT, DATED AUGUST 3, 1896, BY THE TERMS OF WHICH JAMIESON & COMPANY AGREED TO PURCHASE UNDER THE RULES OF THE EXCHANGE 1150 SHARES OF THE STOCK OF THE DIAMOND MATCH COMPANY FROM SCHWARTZ, DUPEE & CO.; THAT THEY AGREED TO RECEIVE SUCH STOCK ON THE 31ST OF AUGUST, 1896, AND PAY THEREFOR THE SUM OF $222 PER SHARE; THAT SCHWARTZ, DUPEE & COMPANY HAD SOLD TO JAMIESON & COMPANY UNDER THE RULES OF THE EXCHANGE, 1150 SHARES OF DIAMOND MATCH STOCK WHICH THEY THEN AND THERE AGREED TO DELIVER TO JAMIESON & COMPANY ON THE 31ST DAY OF AUGUST, 1896, FOR $222 PER SHARE.

In other words, the cards construed together, and according to the rules, customs and methods of the Chicago Stock Exchange, evidence a contract, *that day executed*, between Jamieson & Company and Schwartz, Dupee & Co., but which was a novation, or a contract substituted for a contract of the day before, to which either Schwartz, Dupee & Co. or Jamieson & Co., or possibly both, had been parties.

[The stipulation of facts entered into after the coming in of the master's report, is simply an attempt to trace from the private books of the brokers the daily substitutions merging into the contract of August 3.] Tr. p. 66, *et seq.*

Of this new or substituted contract, his honor, Judge GROSSCUP, in delivering the opinion of the Circuit Court, said: Tr. p. 82.

"There can be no question that there came into existence by the transactions stated a contract, whereby, primarily between Schwartz, Dupee & Company and the defendants (respondents), the latter were obliged to purchase of the former, and the former were obliged to sell to the latter, during the month, seven hundred shares of this stock at the price of 222 per share.

"Nor can there be any doubt that the undisclosed principals of either of these parties were entitled to step into the place of these respective brokers, and in their own name, and for their own benefit, insist upon the enforcement of the contract according to its terms. Clearly, under the rules of the exchange, each of the brokers bound himself, both to the other broker and to the principal whom the broker represented, to carry out the terms of the contract.

"The only question is whether the complainants (petitioners) were parties principal to the contract between Schwartz, Dupee & Co. and the defendants. The evidence discloses that their authority to the brokers was to sell

seven hundred shares of this stock at 229; and while the authority to sell for more than this might be implied, authority to sell for less could certainly not be. They were entitled, under their contract with Schwartz, Dupee & Company, to a purchaser at 229, or more; they were bound to no sale at a figure less. Neither Schwartz, Dupee & Company, nor any persons with whom that firm had contracted, could have compelled the complainants to deliver the stock at a price less than 229.

"But the contract between Schwartz, Dupee & Company and the defendants was for the sale of seven hundred shares at 222. Under the contract between the brokers, the defendants could have demanded a conveyance at 222. But of whom could they have made such demand? Certainly not from complainants.

"Their contract was for 229, and no less.

"The devices of the exchange for clearing and counterbalancing accounts between brokers could not, *without their consent*, change so essential a term of the complainants' sale. It can not be that authority from a principal to sell at 229 can, *without his conscious assent*, be transformed into authority to sell at 222. The original understanding that the sale should be made under the rules and practice of the stock exchange can not be interpreted to give such elasticity to the all-important feature of price. *Who would deal on the exchange as principal if it were understood that the prices named had no fixity; that the obligation might be one thing to-day and another totally different thing to-morrow?* While the substitutions, resulting in prices unquestionably different from those originally authorized, bind the brokers participating, they do not, *in the absence of assent*, reach over so as to change the contract rights of the principals. To hold otherwise would be to abolish, by judicial pronouncement,

the authority on the faith and stability of which every transaction on the exchange is grounded.

"But if the defendants, under the substitution, could not hold the complainants as principals to the contract for the sale at 222, then for want of mutuality the complainants are in no position to hold the defendants. There is, indeed, no identity of contract between the one the complainants authorized and the one entered into between Schwartz, Dupee & Company and the defendants. *That the complainants now choose to accept it is of no significance;* the legal fact remains that they are not so bound, and not being so bound, the defendants on their part, are not legally bound.

"Whatever legal obligation the defendants owe is, under the contract of substitution, to Schwartz, Dupee & Company alone. Between the complainants and the defendants there is no privity, and, therefore, no enforcible obligation.

"For the foregoing reasons the bill must be dismissed."

The undisputed testimony of Mr. Comstock, connected with the firm of Schwartz, Dupee & Company, in explanation of the clearing house sheet dated August 3, 1896, is as follows: Tr. p. 106.

"Q. Mr. Comstock, on this clearing house sheet appears on line 3, the following: 'Sold 1150 Match 222 Jamieson;' will you state what that 1150 included? A. What it included?

Q. Yes. A. Well, it included the 700 Match sold for Clews & Company and 450 more for other clients."

Cross-examination waived.

It is undisputed testimony also, that on September 9, 1896, Schwartz, Dupee & Company wrote and delivered to Jamieson & Company the following letter: Testimony of Billings, one of the respondents Tr. p. 93.

"CHICAGO, September 9, 1896.

Messrs. Jamieson & Company, 187 Dearborn St., Chicago, Illinois.

DEAR SIRS: On August 31, 1896, we tendered you seven hundred (700) shares of Diamond Match stock in settlement of sales made by us. The sales made were 500 shares July 25th, and 200 shares July 27, 1896, you being substituted through the clearing house of the Chicago Stock Exchange August 3, 1896, as the purchaser of said stock.

This is to notify you that said sales were made by us as agents for Henry Clews & Co. of New York, who may rightfully take any proceedings to enforce the contracts for said sales, and who are authorized to make settlement thereof.

Very truly yours,

SCHWARTZ, DUPEE & CO."

Testimony of Billings, Tr. p. 92.

That on the 10th of September, 1896, Henry Clews & Company, by their attorneys, wrote and delivered to Jamieson & Co. the following letter:

"SEPTEMBER 10, 1896.

Messrs. Jamieson & Company, No. 187 Dearborn street, Chicago:

DEAR SIRS: This is to notify you that on Tuesday, the 15th day of September, 1896, at one o'clock P. M., we shall offer for sale, at public auction, to the highest bidder, for cash, at the judicial salesrooms of the Chicago Real Estate Board, No. 57 Dearborn street, in the city of Chicago, county of Cook and State of Illinois, seven hundred (700) shares of stock of the Diamond Match Company, and at said time and place will sell the same to the highest bidder for cash. Said sale will be made for your benefit on account of your contracts with Schwartz, Dupee & Company on the Chicago Stock Exchange, for the purchase by you of said shares, *in which contracts the said Schwartz, Dupee &*

Company were acting as agents of the undersigned, said shares of stock having been tendered you by Schwartz, Dupee & Company in fulfillment of said contracts on the 31st day of August, 1896.

You are further notified that should said stock at said sale sell for less than the amount due from you on said contracts we will look to you to settle the difference, and we will hold you responsible for any loss on account of said contracts.

The contracts of sale referred to herein are the same mentioned in the letter of Schwartz, Dupee & Company accompanying this notice.

In the meantime we hold said stock ready for delivery to you upon payment of the amount due from you under said contracts of purchase.

Very truly yours,

HENRY CLEWS & Co.,

By Estabrook & Davis,

Their Attorneys."

That other correspondence took place among the parties, set forth in the testimony of said Billings, wherein, prior to the commencement of this suit, Jamieson & Company were informed and advised that Schwartz, Dupee & Company acted for and on behalf of petitioners in the sale of August 3d, and that, as principals to said contract, petitioners had ratified and confirmed the same. Tr. idem.

We will have occasion to question the legal conclusions of the trial judge from the facts postulated in his opinion; but his statement of facts requires some modification to conform to the evidence in the case.

For instance: Nowhere in the record is there any testimony that Henry Clews & Company *in so many words* authorized their agents, Schwartz, Dupee & Company,

to sell Diamond Match stock at $229 per share. It is true that on July 25, 1896, in answer to the request of Henry Clews & Company to change their sales of Diamond Match from the July to the August account, Schwartz, Dupee & Company *notified* them that they had "bought in" 700 shares of the stock for the July account and had sold 700 shares at $229 per share for the second or August account, and by acquiescing in this sale, of which they were duly notified as aforesaid, they may be said to have authorized it. But the only sales authorized by Henry Clews & Company *in which a specific price was named*, were *prior* to the sale for $229 per share, to wit, on the 16th and 20th of July, 1896, and the prices then named were *less* than $229 per share, to wit, $220½ and $221; *and that which gives significance to all these sales, and which the trial judge apparently lost sight of, is the fact that the sale at $229 per share on July 25, 1896, and the sale at $222 per share on August 3, were different phases of the same transaction, having its origin July 16 and 20.* THEY REPRESENT THE USUAL AND ORDINARY MUTATIONS OF EVERY SALE OR PURCHASE FOR "THE ACCOUNT" UNDER THE RULES, CUSTOMS AND USAGES PECULIAR TO THE STOCK EXCHANGE.

We have seen that the contract of August 3, was a *substituted* contract, and we have asserted that the *original* contract had its initiative, *not* on July 25, as assumed by the trial judge, but on July 16 and 20. This will appear from the following correspondence.

Tr. p. 103. On the 16th day of July, 1896, at 11:19 A. M., Schwartz, Dupee & Company received the following order from Henry Clews & Company by telegram:

"Sell 500 Diamond Match at 220½ for acct.

(Signed) HENRY CLEWS & COMPANY."

On the same day, at 11:35 A. M., Schwartz, Dupee & Company telegraphed Henry Clews & Company as follows:

"Sold 500 Diamond Match at 221⅛ for the account.

(Signed) SCHWARTZ, DUPEE & Co."

On the 20th of July, 1896, at 9:23 A. M., Schwartz, Dupee & Company received a telegram reading as follows: Tr. p. 103.

"Sell 200 Diamond Match at 221 for the account at opening of market. They want put out at opening if possible, but it is good all day.

(Signed) CLEWS."

On the same day at 10:08 A. M., Schwartz, Dupee & Company telegraphed Clews as follows:

"Sold 200 Diamond Match 221½ for the account.

(Signed) SCHWARTZ, DUPEE & Co."

The foregoing is the only correspondence which took place between the petitioners and their brokers, Schwartz, Dupee & Company, until July 25, when Schwartz, Dupee & Company received the following telegram:

"Change the Diamond Match over to August account at 2½ per cent. If you can not do it let us know at once.

(Signed) CLEWS."

On the same day, at 11:58 A. M., Clews telegraphed Schwartz, Dupee & Company as follows: Tr. p. 103.

"Change the 500 at two cents or better.

(Signed) CLEWS."

On the same day, at 12:11 P. M., Schwartz, Dupee & Co., telegraphed Clews as follows:

"Bought Diamond Match 227 for the account.

Sold 500 229 account 2nd.

(Signed) SCHWARTZ, DUPEE & Co."

On July 27, at 8:55 A. M., Clews telegraphed Schwartz, Dupee & Company as follows:

"Change 200 more Diamond Match 2 per cent or better.

(Signed) CLEWS."

On the same day, at 10:53 A. M., Schwartz, Dupee & Co. telegraphed Clews as follows:

"We changed the 200 Match at 2¼ difference. Will give you prices later.

(Signed) SCHWARTZ, DUPEE & Co."

On the same day at 10:55 A. M., Schwartz, Dupee & Company telegraphed Clews as follows:

"Bought 200 Match 226¾ account. Sold 200 2nd account 229.

(Signed) SCHWARTZ, DUPEE & COMPANY."

The record shows no other correspondence to have taken place between Clews & Company and Schwartz, Dupee & Company.

It was stipulated in writing that the orders of Henry Clews & Company, and Schwartz, Dupee & Company contained in the foregoing messages were, as a matter of fact, *executed as set forth in the aforesaid messages from Schwartz, Dupee & Company on the Chicago Stock Exchange.*

Tr. p. 104.

EXPLANATION: From the foregoing testimony it is evident that Henry Clews & Company had sold for future delivery 500 shares of the stock of the Diamond Match Company at $221⅛ and 200 shares of said stock at $221½, making a total sale of 700 shares at an average price of more than $221 per share; that they had purchased 500 shares of the same stock for $227 per share and 200 shares of the same stock at $226¾ per share.

If we assume that the brokers of Henry Clews & Company had sold for them the 700 shares of Diamond Match stock to A at $221 for delivery July 31, and had purchased 700 shares of Diamond Match stock from B at $227 per share

for delivery July 31, it might save time and trouble if the same broker would, on July 31, bring A and B together, instead of having B deliver to Clews & Company and the latter deliver to A. And this would obviously be so if A and B were brokers and members of the exchange operating for undisclosed principals.

The stock exchange clearing house is designed for the purpose of facilitating just such transactions and for no other purpose.

But it is evident from the telegrams that a closing out or liquidation of the contracts of July 16 and 20 was not contemplated, but only a *change* from the July to the August account—that is to say, an extension of the time of delivery for thirty days. This change was accomplished as follows:

We have already pointed out the necessity of a deposit of $10 a share as a trust fund on all shares bought or sold. It follows, therefore, that when on the 16th day of July, 1896, Schwartz, Dupee & Company sold for Henry Clews & Company 500 shares of the stock of the Diamond Match Company for $221 per share, they deposited for and on account of Henry Clews & Company $5,000, and on their sale of 200 shares July 20, they deposited $2,000; but between July 20 and July 25 the market price of this stock appears to have advanced from $221 per charge to $227 per share—a potential loss to Henry Clews & Company of $6 per share; therefore Schwartz, Dupee & Company must have deposited in the trust fund between July 20 and July 25, $4,200, in addition to the $7,000 originally deposited.

On and after the 25th day of any month, however, the rules of the Chicago Stock Exchange permit the trading in what is known as the "second account," which, in the case at bar, would be the August account. Mr. Wilkins, man- Tr. p. 110.

ager of the exchange, explains the process of changing from one account to another as follows:

"From the 25th day of any month up to the day before delivery day, which is the day before the end of the month, I call two accounts, first account and second account. The first account is the account of the present month, which in that case would be July; the second account would have been the next account, which would have been August; then on the day before the last day of the month that stops and you go right on to the one account, which is August.

Q. These changes or transfers take place then, at what time in the month? A. Any time after the 25th.

* * * * * * *

Q. Assuming, Mr. Wilkins, that on the 25th day of July, 1896, at 11:41 A. M., a telegraphic order is received from a party in New York by a broker in Chicago, member of the stock exchange, in these words: 'Change the Diamond Match over to August account at two and a half per cent; if you can not do it, let us know at once.' Please explain to the master what is meant there by the two and a half per cent, according to the rules and customs and nomenclature of the stock exchange?

Judge McConnell: Objected to.

Tr. p. 111; testimony of Wilkins.

A. It would mean that the 500 shares of stock which they had sold for their July account they did not wish to deliver on the last day of the month, therefore they went in and bought it in for one party and sold it out again for the August account, keeping themselves short the same amount of stock *and making that difference*, (which they would,) or at least what they wanted to make, two and a half—what they would make, I don't know.

Q. What is the two and a half per cent? A. Two dollars and a half a share, $250 on every 100 shares of stock

for changing, *for carrying the stock for another broker for another month.*

Q. That would be compensation or commission? A. Interest.

Q. It is the compensation or brokerage of the— A. Hardly called brokerage.

Q. Or commission of the broker? A. It is what one party who has 500 shares of stock—one broker who has 500 shares of stock that he is carrying for a customer and that customer is not prepared to take it up and he is perfectly willing to pay whatever anybody else, who is on the other side of the market will do it for, for carrying it for thirty days.

Q. Supposing, Mr. Wilkins, that a sale of stock is made on the exchange on the 16th day of July, on account; the person who purchases is known at that time to the officers of the exchange, is he? A. Yes, sir; you mean if it is made publicly on the exchange?

Q. I mean if it is made on the floor of the exchange. A. Yes, sir.

Q. Would that person necessarily be the purchaser of that stock or the responsible purchaser of that stock on the account day of that month?

Judge McConnell: I object to that especially because it involves an expression of a legal opinion; and I stand on that objection. Tr. p. 111; testimony of Wilkins.

The Master: Let it go in subject to the objection.

A. No, sir.

Q. All sales or purchasers for the account are made through the clearing house as I understand it, to which you have referred? A. All trades made for the account must go through the clearing house."

After the witness is interrogated as to his authority for making substitutions he is asked:

"Q. Please explain to the master and myself the working of that rule. A. It simply says—I can say what it says myself, so as to have what may follow come in line with it. It says that the manager shall borrow or loan stock; it means to say that if you are a member of the Stock Exchange and put in a clearing house sheet on one morning, and in balancing that sheet you are 500 shares—you show that you are 500 shares of Diamond Match long (*i. e.*, bought), you put that sheet in, and by putting that in with the sheet in the condition it is, it is taken as authority for the manager of the clearing house to borrow that stock for you from somebody else; *that is what the clearing house is for, to save the broker the bother of doing that business himself.* The Judge might be another member of the exchange; he might put in a sheet showing that he was short (*i. e.*, sold) 500 shares of Diamond Match, in other words, just the opposite to what you would be, or there might be five different brokers on the floor, each putting in a sheet 100 shares short. If you are long, the manager of the clearing house through his clerks takes every sheet; the sheets must all balance or else the business stops and don't go on until it does balance; so that the stock and differences must balance every day before the summary is made up; therefore, if you are 500 shares of stock long on Diamond Match, there must be somebody in that clearing house who is 500 shares of stock short, or the sheets wouldn't balance; therefore the manager of the clearing house borrows from you, who may be long 500, to supply the judge, if he is short 500, or to supply five other men who are short 100 each, and in doing that the summary is made up, and they get that notice which you have just referred to.

Tr. p. 114; testimony of Wilkins.

Q. That, in effect, Mr. Wilkins, results, does it not, in the substitution from time to time, or from day to day, as the case may be, of a different purchaser or buyer of stock? A. It may or it may not."

COMMENT.

Taking the telegrams of Henry Clews & Company of July 25, and the testimony of Mr. Wilkins together, and we have an example of how a person who has contracted to deliver a number of shares of stock on the account day is enabled to make an extra profit by granting an extension of time for delivery to the second account day.

ILLUSTRATION: If A, who has agreed to purchase 700 shares of stock and pay for them $227 per share on the 31st day of July, is obliged to borrow money of the bank to meet his obligation he would, ordinarily, be required to pay interest on the money borrowed, hypothecate the shares of stock purchased, and in addition pledge a large amount of collateral. If, therefore, he can induce the vendor to extend the time of delivery thirty days by agreeing to pay him $2 per share extra (for instance), he would, perhaps prefer to do so, rather than to borrow of the bank. The process is accomplished on the stock exchange by the vendor buying of the vendee at the contract price and forthwith agreeing to sell him the same number of shares for the second account at the advanced price agreed upon. Mr. Wilkins, in his testimony, denominates this compensation "interest," in analogy, possibly, to what a banker would call it were the same result accomplished by a loan from the bank. We should presume that, legally speaking, it would be a new consideration for an agreement to extend the time of performance. The case we have supposed is an ideal one. In practice, the repur-

chase by the vendor may be from A and the resale to B through substitutions made by the manager of the clearing house.

The process is plainly illustrated by counsel for stock exchange in their brief on the petition for writ of *certiorari*, from which we quote as follows: (p. 7.)

"If the party to whom Clews & Co. had sold it, whom we will call Z, did not want to pay for it on the July delivery day and would pay interest at $2.50 per share or even $2 a share, Clews was willing to let him have the time and carry the trade, *i. e.*, not deliver the stock for another month. If, on the contrary, Z wanted the stock, but there was some third party, "A," in the market, who had bought 500 shares of "B," but did not want to pay for it until the next delivery day, then Clews' broker would buy of "A," at the market price his right to such 500 shares, get an order from "A" on "B" to deliver the shares to Z, and in turn sell back to "A" for August delivery the 500 shares which were originally sold to Z, at the market price plus the interest. In other words, with the consent of all parties, and by this process of buying and selling back, Clews & Co. would substitute "A" in a new trade for Z. To get this interest or carrying charge the dispatches of July 25th, were sent by Clews. The $2.50 and $2 spoken of in the dispatches is not commissions nor differences in settlement of stocks, but, as Wilkins testifies, is interest, pure and simple, or carrying charges. (Rec. 125.) It differs in no way from the interest the buyer would have to pay if he went to the bank and got the use of the money represented by the stock for thirty days. It depends in no way on the price of the stock, and in no way represents or marks the difference between what the stock was originally contracted to be sold for, and the market price at the day of the turn over, but

is dependent on the money market, which, in the Bryan campaign, was very high."

Applying the facts evidenced by the telegrams of July 25th to the case at bar and we have:

1. The expressed willingness on the part of Henry Clews & Company to have the time of delivery of the 700 shares of Diamond Match stock sold by them, extended from July 31st to August 31st, that is, from the first account to the second account.

2. Provided, however, that they were paid a certain price for the accommodation.

3. That the 25th of the month was the first day under the rules when such an accommodation could be asked for or would be permitted.

4. That the brokers of Henry Clews & Company were authorized to grant such an extension of time for not less than 2 per cent par value of the stock, *i. e.*, $2 per share.

5. That unless this price or better could be obtained for the accommodation, the purchaser would have no alternative but to accept the stock to be tendered on the 31st, or take the consequences of a breach of contract.

6. That the purchaser was, as a matter of fact, willing to pay the extra compensation and the change was effected by Schwartz, Dupee & Company buying 700 shares of the Diamond Match Company stock at $227 per share for the first account and selling 700 shares of Diamond Match stock at $229 per share for the second account.

7. That the effect of this transaction was to cancel the obligation of Henry Clews & Company to deliver 700 shares of the stock of the Diamond Match Company on July 31st at $221 per share and left them obligated to deliver the same number of shares of said stock on August 31st at $229 per share; that this novation had been brought about in the

ordinary course of dealing and had required a cash advance by Henry Clews & Company, or their brokers, Schwartz, Dupee & Company, of $4,200, being the difference on 700 shares of stock between $221 per share, the price sold for on July 16th and 20th, and $227 per share, the purchase price on July 25th.

8. *That according to the usual course of dealing, on trades for the account, it is probable that between July 25 and August 3, there had been substituted for the original purchasers on July 25, at $229 per share, other purchasers from day to day at other prices, the substitutions being made by the manager of the clearing house at his discretion, the parties substituted being notified of the substitution and assenting thereto in writing, and the differences in price being equated by paying into or taking from the trust fund of $14,000 on deposit.*

9. *So that when the contract of July 25th at $229 per share, through these daily novations and substitutions, had merged into the contract of August 3rd at $222 per share, all prior contracts had been canceled and annulled; that Jamieson & Company, representing, as it now appears, J. H. & W. H. Moore, had then agreed to purchase the 700 shares of stock sold by Henry Clews & Company, through their brokers, Schwartz, Dupee & Company, and receive and pay for them, on the 31st day of August, $222 per share.*

Testimony of Wilkins, Tr. p. 120.

10. *That after August 3rd, there was no further novation or substitution through the clearing house of the stock exchange, because, by resolution of its board of managers, the exchange, on August 4th, closed its doors indefinitely, not opening, as a matter of fact, until November 5th following.*

The resolution referred to is in words and figures following to wit:

"*Resolved, that the Exchange adjourn on Tuesday morning 4th*

inst., and remain closed pending further action by this committee." Tr. p. 120.

On August 31, 1896, at about 1 P. M., John W. Conley, of the firm of Schwartz, Dupee & Company, called upon the firm of Jamieson & Company at their private office; met Mr. Jamieson of that firm personally and told him that he desired to deliver 1150 shares of Diamond Match stock. Conley was referred by Jamieson to the outside office. He then went to the desk of the stock clerk and there saw Mr. Billings of the firm of Jamieson & Company, and one of the appellees herein, and told him he was there to deliver 1150 shares of Diamond Match stock and tendered certificates for the same. Mr. Billings asked to see the stock for the purpose of taking the numbers of the certificates. The certificates were passed to him. He examined same very carefully, seemed to make some memorandum of something in relation to them, pushed the certificates back with the remark that the stock exchange was closed and that the parties for whom they had bought would not receive it from them; hence they could not take it from Schwartz, Dupee & Company. Tr. p. 96.

Then followed the correspondence to which reference has already been made. Tr. pp. 92 and 93.

The following notice a few days prior to the 15th of September was thereupon mailed to every stock broker and banker in the city of Chicago. Testimony of Davis, Tr. p. 128.

"Notice is hereby given that on Tuesday, the 15th day of September, 1896, at one o'clock P. M., at the judicial salesrooms of the Chicago Real Estate Board, No. 57 Dearborn street, in the city of Chicago, county of Cook, and State of Illinois, the undersigned will offer for sale, and sell at auc-

tion, to the highest bidder for cash, seven hundred (700) shares of the capital stock of the Diamond Match Company.

HENRY CLEWS & COMPANY.

By Estabrook & Davis.

Their Attorneys."

There was also inserted an advertisement, in the same language, in the *Chicago Daily Bulletin*, a legal paper of general circulation among bankers, brokers, real estate men, and lawyers in the city of Chicago. This advertisement ran for three days. Every newspaper in the city of Chicago also made notice of this advertised sale. On the 15th day of September, at the hour appointed for the sale, there were in attendance about one hundred persons, stock brokers and people interested in the sale, at which hour it was adjourned for one week—until the 22d of September, at 1 o'clock P. M.—public announcement being made to this effect. The adjournment was noticed in all the Chicago newspapers. On the 21st of September a printed notice was again mailed to all the bankers and stock brokers in the city of Chicago—about 300 in number—which notice was as follows:

"Notice is hereby given that the auction sale advertised for Tuesday, the 15th day of September, 1896, at one o'clock P. M., at the judicial salesrooms of the Chicago Real Estate Board, No. 57 Dearborn street, in the city of Chicago, county of Cook, and State of Illinois, for the sale of seven hundred (700) shares of the capital stock of the Diamond Match Company was adjourned until Tuesday, September 22, 1896, at one o'clock P. M., at which time and at the same place, said stock will be sold to the highest bidder for cash.

HENRY CLEWS & Co.

By Estabrook & Davis,

Their Attorneys."

On the 22d day of September, at one o'clock, at the judicial salesrooms of the Chicago Real Estate Board, there were offered at public auction seven hundred (700) shares of the stock of the Diamond Match Company for sale to the highest bidder. There were present between seventy-five and one hundred people. The room was well filled. Bids started at less than par and were raised several times, until Mr. Gage, a stock broker, bid $130 per share. Mr. Barber, the president of the Diamond Match Company, was present and made a bid for 200 shares at $135 per share. *He was told that no bid would be accepted for less than the whole 700 shares unless there was also furnished a bid for the balance of the 700 shares, so that the total amount, if bid in separate amounts, would amount to more than $130 per share for the whole.* No higher bid was received for the whole of the stock. After several minutes of waiting and repeated warnings the 700 shares were struck off and sold to the said Frank N. Gage at $130 per share. An order was given Mr. Gage on Schwartz, Dupee & Co., to deliver the shares to him upon payment of the amount bid.

On September 24th, 1896, at 10:05 o'clock, there was delivered personally to Mr. Wilkins, secretary and manager of the Stock Exchange, the following letter:

SEPTEMBER 23, 1896.

To the Chicago Stock Exchange and its Governing Committee, Chicago:

DEAR SIRS: There is on deposit in the exchange twenty dollars ($20) per share on seven hundred (700) shares of the Diamond Match Company stock, sold by us to Jamieson & Company for the August account; of this amount ten dollars ($10) per share were deposited by us and ten dollars

($10) per share by Jamieson & Company to protect said contracts.

A tender of the stock was made by us to Jamieson & Company at their office, on the 31st day of August, 1896, before 1:30 P. M., as required by the rules. Jamieson & Company refused to accept the stock, and we now demand a payment to us of the amount of said deposits. Our clients in the transaction were Henry Clews & Company, and this demand is made on their behalf without prejudice to their right to recover from Jamieson & Company any damages on account of the latter's default.

Very truly yours,

SCHWARTZ, DUPEE & CO.

We concur in the above request.

HENRY CLEWS & CO.

By Estabrook & Davis.

The foregoing, testimony of Davis, Tr. p. 128.

To this letter no reply was ever made.

Tr. p. 137.

On the hearing before the master the following facts were stipulated:

STIPULATION.

That at the time complainants gave the several orders to Schwartz, Dupee & Company to sell on the Chicago Stock Exchange the various amounts of Diamond Match Company stock, and at the time said Schwartz, Dupee & Company executed said orders, said Schwartz, Dupee & Company did not have in their hands any stock of said Diamond Match Company which was the property of the complainants, nor did Schwartz, Dupee & Company at any time thereafter have in their hands any of the stock of said Diamond Match Company which was the property of the complainants.

It is admitted by the complainants that the 1150 shares

of the capital stock of the Diamond Match Company tendered to Jamieson & Company by Schwartz, Dupee & Company on August 31, 1896, were not the property of the complainants, nor any part thereof.

It is further admitted that the 700 shares of said stock alleged in the bill of complaint to have been sold on the 22d day of September, 1896, were not delivered to Frank N. Gage, but immediately after said sale said shares of stock were delivered to Major J. W. Conley, one of the firm of Schwartz, Dupee & Company, by H. J. Davis, who conducted said sale on behalf of Henry Clews & Company, for safe keeping by the said J. W. Conley; that afterwards, and on the same day, said H. J. Davis delivered to said Frank N. Gage a memorandum in words as follows:

SEPTEMBER 22, 1896.

Sold to Frank N. Gage 700 shares of Diamond Match Stock numbered A680–686, inclusive, at $130 per share.

HENRY CLEWS & CO.

Per Estabrook & Davis.

That thereupon said Gage wrote below said memorandum the following:

CHICAGO, September 22, 1896. O. K.

Please deliver above to I. H. Waggoner, Esq., and accept his check in settlement.

FRANK N. GAGE.

And thereupon said Gage redelivered said memorandum and said order to said H. J. Davis, who thereupon delivered the same to Mr. I. H. Waggoner, together with an order on Schwartz, Dupee & Company to deliver said certificates of shares to said Waggoner, upon being paid the amount of $130 per share. That said Gage was employed by said

Waggoner to bid at said sale and that said Waggoner was acting for and on behalf of the complainants in this suit in the employment of said Gage.

To this stipulation there is attached the following objection:

Complainants object to the foregoing admissions being considered as evidence; for while admitting that these are the facts, at the same time they claim that they are immaterial to the issues in this case, and object on the ground of immateriality.

It appears from the evidence that the seven hundred shares of Diamond Match stock offered at public sale were furnished under the following arrangement between petitioners, Henry Clews & Co., and their brokers, Schwartz, Dupee & Co. The stock was furnished by Schwartz, Dupee & Co. to Clews & Co. to be put up at auction. In case the stock passed out of the hands of Schwartz, Dupee & Co., Clews & Co. obligated themselves to substitute other stock either at the time owned by them or to be purchased by them.

Comstock, Tr. p. 139.

Tr. p. 140.

There was also introduced in evidence a statement of the settlement prices for Diamond Match stock after the reopening of the exchange for each day from November 5th to December 10, 1896. On November 5th (the day of reopening) the settlement price was $1.29. The lowest price for which said stock sold between November 5th and the date of trial was on December 21, 1896, when the price was $1.08½; and the highest price was on September 17, 1897, when it was $1.61½.

Comstock, Tr. p. 140.

It further appeared in evidence that Jamieson & Co. had settled with Schwartz, Dupee & Co. for 450 shares of the 1,150 shares referred to in the clearing-house sheet of August 3, 1896, and that such settlement did not include the 700 shares involved in this case.

After the report of the master, and before argument on respondents exceptions thereto, there was stipulated into the record, to be considered as evidence so far as material, a statement taken from the books of the respondents Jamieson & Co., and Schwartz, Dupee & Co., showing their daily sales and purchases of Diamond Match stock between July 25, 1896, and August 3d following. Tr. p. 66.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in affirming the decree of the Circuit Court.

2. The Circuit Court of Appeals erred in not reversing the decree of the Circuit Court.

3. The Circuit Court of Appeals, having only appellate jurisdiction, erred in not accepting the finding of fact of the master, concurred in by the trial court, that the contract here sued upon was a valid contract; there being on the part of the master no error in the application of the law and no mistake in his consideration of the evidence on which such finding was based.

4. The Circuit Court of Appeals erred in holding that the contract of August 3, 1896, was a gambling contract, the pleadings not raising the question, and no evidence having been specifically directed to such an issue.

5. The Circuit Court of Appeals erred in finding as a fact, from the record evidence, that the transaction on the Chicago Stock Exchange, resulting in the contract of August 3, 1896, under and in pursuance of the rules, customs and usages of such exchange, was a gamble or wager as to the future market price of corporate stock.

7. The Circuit Court of Appeals erred in not reversing the decree of the Circuit Court and directing a decree in favor of appellants in all respects as recommended by the master.

The foregoing specification of errors necessarily involves a consideration of all the issues disclosed by the record, and for the sake of convenience our brief and argument will follow the specification of issues rather than the specification of errors.

BRIEF OF ARGUMENT.

I.

(A.) SCHWARTZ, DUPEE & COMPANY WERE FULLY AUTHORIZED BY CLEWS & COMPANY TO ENTER INTO THE CONTRACT OF AUGUST 3D IN THEIR BEHALF, AND CLEWS & COMPANY WERE BOUND THEREBY. (B.) BUT EVEN IF UNAUTHORIZED TO ENTER INTO THE CONTRACT OF AUGUST 3D, SCHWARTZ, DUPEE & COMPANY IN MAKING IT AFFECTED TO ACT AS AGENTS OF PETITIONERS, AND THE LATTER HAVE RATIFIED THE CONTRACT AND ADOPTED IT AS THEIR OWN. (C.) AND EVEN IF IT SHOULD BE HELD THAT THE CONTRACT OF JULY 25TH, AT $229 PER SHARE, HAD BEEN LOST OR DISSIPATED, AND IN LIEU THEREOF PETITIONERS' AGENTS HAD ATTEMPTED TO SUBSTITUTE THE CONTRACT OF AUGUST 3D AT $222 PER SHARE, PETITIONERS ARE ENTITLED IN EQUITY TO AVAIL THEMSELVES OF SUCH CONTRACT. (D.) FURTHERMORE, AND IN ANY EVENT, ALL PARTIES IN INTEREST BEING BEFORE THE COURT, THERE SHOULD HAVE BEEN MADE AN END TO THE LITIGATION BY ORDERING, IF NEED BE, THE FILING OF A CROSS-BILL.

A.

Maxted v. *Paine*, L. R., 6 Ex. 132.
Hodgkinson v. *Kelly*, L. R., 6 Eq. 496.
Higgins v. *McCrea*, 116 U. S. 671.
Sheppard v. *Murphy*, 16 W. R. 948.
Hawkins v. *Maltby*, L. R., 4 Eq. 572; affirmed on appeal, L. R., 3 Ch. App. 188.
Irwin v. *Williar*, 110 U. S. 511.
Bibb v. *Allen*, 149 U. S. 481.
Dos Passos on Stock Brokers and Stock Exchanges, Chap. 5, Sub-head VII.

B.

Hagedorn v. *Oliverson*, 2 M. & S. 485.
Cook v. *Tullis*, 18 Wall. 338.
Shoninger et al. v. *Peabody*, 17 Atlantic Rep. 279.
Wharton on Contracts, Sec. 2.
Wharton on Agency, Sec 81.
19 Cent. Law Journal, 482.
See doctrine of Mr. Mechem (Agency, Sec. 179) criticised; 25 Am. L. Reg. p. 74; 9 Harvard L. R. p. 64.

C.

Cook v. *Tullis*, *supra*.
Pomeroy's Equity Jurisprudence, Vol. 2, Sec. 1051.
Bank v. *Insurance Co.*, 104 U. S. 54.

D.

Sims v. *Burk*, 109 Ind. 214.
Chamley v. *Lord Dunsany*, 2 Schoales & Lefroy, 690.

II.

THE REMEDY PROVIDED BY THE RULES OF THE STOCK EXCHANGE FOR BREACH OF CONTRACT, DOES NOT OUST THE COURTS OF JURISDICTION, FOR THE FOLLOWING REASONS:

1. THE RULES DO NOT DECLARE SUCH REMEDY TO BE EXCLUSIVE.

2. SUCH A PROVISION IN A CONTRACT WOULD BE AGAINST PUBLIC POLICY AND VOIDABLE.

3. PARTICULARLY IN VIEW OF THE INDEFINITE CLOSING OF THE STOCK EXCHANGE.

1.

Tr. p. 123. Article VII of the by-laws of the Stock Exchange.

Tr. p. 124. Article XVII of the by-laws of the Stock Exchange.

2.

Gourlay v. *Duke of Somerset*, 19 Ves. Jr. 429.

Waugh v. *Shlenck*, 23 Ill. App. 433.

Birmingham Fire Insurance Co. v. *Pulver*, 126 Ill. 338.

Mentz v. *Armenia Fire Insurance Co.*, 79 Pa. St. 478; S. C., 21 Am. Rep. 80.

Scott v. *Avery*, 5 H. of L. Cas. 811.

Home Insurance Co. v. *Morse*, 20 Wall. 445.

Kinney v. *B. & O. Employes' Association*, 35 W. Va. 385; S. C., 15 L. R. A. 142.

Dos Passos on Stock Brokers and Stock Exchange, pp. 78–83.

3.

Morse, Arbitration and Award, pp. 229, 234, 236, and authorities cited.

III.

THE PRICE BID FOR 700 SHARES OF DIAMOND MATCH STOCK AT THE PUBLIC SALE CONDUCTED AT THE INSTANCE OF PETITIONERS, RAISED A PRIMA FACIE PRESUMPTION OF VALUE WHICH, IN THE ABSENCE OF CONTROVERTING EVIDENCE, BECOMES CONCLUSIVE. PARTICULARLY IS THIS TRUE WHEN THE METHOD OF ESTABLISHING VALUE URGED BY RESPONDENTS AS THE EXCLUSIVE METHOD WOULD HAVE RESULTED IN GREATER LOSS TO THE RESPONDENTS.

Knowlton v. *Fitch*, 52 N. Y. 288.

White v. *Smith et al.*, 54 N. Y. 522.

Fisher v. *Newark City Ice Co.*, 62 Fed. Rep. 569; affirmed, 76 Fed. Rep. 427.

Benjamin on Sales, Book II, Chap. 5.

Rhea v. *Riner*, 21 Ill. 526.

Wade v. *Moffett et al.*, 21 Ill. 110.

Seckel v. *Scott*, 66 Ill. 106.

Barrow v. *Window*, 71 Ill. 214.

Owens v. *Weedman*, 82 Ill. 409.

Bagley v. *Findlay*, 82 Ill. 524.

Ullmann v. *Kent*, 60 Ill. 271.

Saladin v. *Mitchell*, 45 Ill. 84.

Benjamin on Sales, Sec. 794.

Hayes v. *City of Nashville*, 80 Fed. Rep. 641.

Morris v. *Wibaux*, 159 Ill. 646.

Fidelity Co. v. *Roanoke Iron Co.*, 81 Fed. Rep. 449.

Mulvey v. *Gibbons*, 87 Ill. 367.

Gibbons v. *Hoag*, 95 Ill. 45.

Jenkins v. *Pierce*, 98 Ill. 646.

And see particularly the case of *Cunningham* v. *Macon & Brunswick R. R.*, 156 U. S. 400.

Collins v. *Riggs*, 14 Wall. 491.

Strauss v. *Labsap*, 59 Mo. App. 260.
Weld v. *Rees*, 48 Ill. 428.
Jacobs v. *Turpin*, 83 Ill. 424.

IV.

THIS SUIT WAS PROPERLY BROUGHT (AND PETITIONERS CAN HAVE ADEQUATE RELIEF ONLY) IN A COURT OF EQUITY; AND FOR THE FOLLOWING REASONS:

1. BECAUSE THE FUND IN THE POSSESSION OF THE MANAGERS OF THE STOCK EXCHANGE IS A TRUST FUND WHICH EQUITY IS ASKED TO ADMINISTER.

2. BECAUSE IT IS DOUBTFUL IF AN ACTION AT LAW WOULD LIE IN THE NAME OF THE PETITIONERS AGAINST THE STOCK EXCHANGE.

3. BECAUSE IF THE PETITIONERS COULD SUE THE STOCK EXCHANGE AT LAW THE REMEDY WOULD NOT BE AS COMPLETE NOR AS EFFECTUAL AS THE RELIEF IN EQUITY.

4. BECAUSE THE CONTRACT OF JAMIESON & COMPANY WAS A SINGLE CONTRACT FOR THE PURCHASE FROM SCHWARTZ, DUPEE & CO. OF 1150 SHARES IN WHICH THE PETITIONERS WERE INTERESTED ONLY TO THE EXTENT OF 700 SHARES.

1.

For definitions of "deposit," "bailment," and "trust," citing:
Story on Bailments, Ch. 1, Sec. 2.
Edwards on Bailments.
2 Black. Com., 452.
Jones on Bailment, 117.
Rapalje's Law Dictionary, Tit. "Deposit."

Cases in point:
Manhattan Bank v. *Walker*, 130 U. S. 267.
Goodenow v. *Snyder*, 3 G. Green, Ia. 599.

Coster v. *Murray*, 5 Johns. Ch. 532.
Kane v. *Bloodgood*, 7 Johns. Ch. 90.
McCrea v. *Purmort*, 16 Wend. 460; S. C., 30 Am. Dec. 103.
Gutch v. *Fosdick*, 48 N. J. Eq. 353.
Levi v. *Evans*, 6 C. C. A. 500.
McCampbell v. *Brown*, 48 Fed. Rep. 795.
National Park Bank v. *Halle*, 30 Ill. App. 17.
Warner v. *Martin*, 11 How. (U. S.) 209.
Pomeroy's Equity Jurisprudence, Sec. 158.
Bailey v. *Ins. Co.*, 114 Mass. 177.

2.

National Bank v. *Insurance Co.*, 104 U. S. 54.
Dillon v. *Ins. Co.*, 44 Md. 386.

3.

Boyce's Ex'rs v. *Grundy*, 3 Peters, 215.
Oelrichs v. *Spain*, 15 Wall. 211.
McConihay v. *Wright*, 121 U. S. 201.

4.

Phillips v. *Edsall*, 127 Ill. 535.
Chapman v. *Shattuck*, 3 Gil. (Ill.) 49.

V.

A. THE CONTRACTS OF SALE AS ORIGINALLY ENTERED INTO BY SCHWARTZ, DUPEE & COMPANY ON BEHALF OF CLEWS & COMPANY JULY 16 AND JULY 20 WERE IN ALL RESPECTS CONVENTIONAL, AND BOUND CLEWS & COMPANY TO DELIVER A SPECIFIED NUMBER OF SHARES AT A SPECIFIED TIME AT A SPECIFIED PRICE, AND WERE THEREFORE PRIMA FACIE VALID. B. SUCH CONTRACTS WOULD NOT BE INVALIDATED EVEN IF THE TESTIMONY SHOWED (WHICH IT DOES NOT) THAT AT THE TIME OF ENTERING INTO THEM CLEWS & COMPANY DID NOT OWN OR CON-

TROL THE NUMBER OF SHARES OF THE PARTICULAR STOCK CONTRACTED FOR. C. SUCH CONTRACTS BEING PRIMA FACIE LAWFUL COULD NOT BE VOIDED AS WAGERING CONTRACTS BY SHOWING THAT ONE PARTY ONLY SO UNDERSTOOD AND MEANT THEM TO BE. TO VOID SUCH CONTRACTS AS WAGERING CONTRACTS, THE PROOF MUST GO FURTHER, AND SHOW A MUTUAL AGREEMENT AND UNDERSTANDING OF THE PARTIES, COLLATERAL TO THE OSTENSIBLE CONTRACT OF SALE, THAT THE SUBJECT-MATTER OF THE CONTRACT SHOULD NOT BE DELIVERED OR RECEIVED, BUT THAT SETTLEMENT SHOULD BE MADE ACCORDING TO DIFFERENCES IN PRICE. D. AND SUCH COLLATERAL UNDERSTANDING MUST BE PLEADED AND FOUND AS A FACT FROM EVIDENCE DIRECTED TO THE PARTICULAR ISSUE, WITH THE BURDEN OF PROOF UPON THE PARTY SEEKING TO IMPEACH THE TRANSACTION, FAILING WHICH THE COURT IS WITHOUT WARRANT OR AUTHORITY TO IMPUTE UNLAWFUL MOTIVES OR INTENTIONS TO PARTIES LITIGANT; PARTICULARLY WHERE, AS IN THE CASE AT BAR, THERE IS NOT A SCINTILLA OF EVIDENCE INDICATING AN INTENTION TO GAMBLE ON THE PART OF ANY PERSON CONCERNED. E. THE SUBSEQUENT MUTATIONS OF THE CONTRACTS OF JULY 16 AND JULY 20, IN PURSUANCE OF THE USUAL AND CUSTOMARY METHODS OF THE CHICAGO STOCK EXCHANGE, DID NOT OPERATE TO CONVERT A CONTRACT OTHERWISE LAWFUL INTO A GAMBLING CONTRACT; FOR AT NO SUBSEQUENT PHASE OF THE TRANSACTION WERE CLEWS & COMPANY RELEASED FROM THEIR ORIGINAL OBLIGATION TO DELIVER THE FULL NUMBER OF SHARES CONTRACTED FOR AT THE TIME SPECIFIED, AND BY NO POSSIBILITY COULD THEY RECEIVE FOR THOSE SHARES A GREATER OR LESSER AMOUNT THAN THE SUM ORIGINALLY AGREED TO BE PAID. F. A CONTRACT FOR THE DELIVERY OF A COMMODITY AT A PRICE CERTAIN AND AT A TIME SPECIFIED, IS NOT AN OPTION CONTRACT AND IS NOT,

THEREFORE, WITHIN THE OPERATION OF THE STATUTES OF ILLINOIS PROHIBITING OPTION CONTRACTS.

Kirkpatrick v. *Bonsall*, 72 Pa. St. 158.
Smith v. *Bouvier*, 70 Pa. St. 332.
Porter v. *Viets*, Fed. Cas. 11,291.
Hentz v. *Jewell*, 20 Fed. Rep. 593.
Clarke v. *Foss et al.*, 5 Fed. Cas. 2852 (7 Biss. 540.)
Ward v. *Vosburgh*, 31 Fed. 12.
Sawyer, Wallace & Co. v. *Taggart*, 77 Ky. 727.
Gregory v. *Wendell*, 40 Mich. 432.
Hatch v. *Douglass*, 48 Conn. 116.
Irwin v. *Williar*, 110 U. S. 499.
Rountree v. *Smith*, 108 U. S. 269.
Warren & Co. v. *Scanlan*, 59 Ill. App. 138; 68 Ill. App. 213; 169 Ill. 142.
Jamieson v. *Wallace*, 167 Ill. 388.
Soby v. *People*, 134 Ill. 71.
Edwards v. *Hoeffinghoff*, 38 Fed. 640.
Bangs v. *Hornick*, 30 Fed. 97.
Union Natl. Bank v. *Carr*, 15 Fed. Rep. 438.
Hansen v. *Boyd*, 161 U. S. 397.
Lehman v. *Feld*, 37 Fed. Rep. 852.

ARGUMENT.

I.

A.—Question of Privity.

The opinion of Judge Grosscup after a casual reference to the sales of July 16 and 20, 1896, dismisses them utterly from consideration in the following language:

Tr. p. 80. "Later in the month, at the instance of the complainants, these transactions were changed to the August account, at 229."

The method by which this change was accomplished, or how the sale for the August account had evolved out of the sales for the July account, or what possible relationship there could be between them, the learned judge makes no effort to discover. His entire reasoning is consequently based upon two false premises, to wit:

First. He assumes that the only sale *authorized* by Clews & Company was of 700 shares of the stock of the Diamond Match Company at $229 per share; whereas there is no evidence whatever that Clews & Company had, in so many words, ordered a sale at $229, the fact being that the only sales authorized *at a specified price* were the sales of July 16 and 20. The sale at $229 per share on July 25 had evolved out of these prior sales in the ordinary routine incident to every sale for the account just as did the sale of August 3 at $222.

Second: The opinion assumes, therefore, that the con-

Tr. p. 83. tract of August 3 was *not* authorized by Clews & Company, and that they could not be bound by it *without their consent.* This thought is several times reiterated. For instance, it is said:

"The devices of the Exchange for clearing and counterbalancing accounts between brokers could not, *without their consent*, change so essential a term of the complainants' sale."

And again:

"It can not be that authority from a principal to sell at 229 can, *without his conscious assent*, be transformed into authority to sell at 222."

And again:

"While the substitutions, resulting in prices unquestionably different from those originally authorized, bind the brokers participating, they do not, *in the absence of assent*, reach over so as to change the contract rights of the principals."

The learned judge not only emphasizes the necessity of a "conscious assent," but refuses to *imply* such assent, for the reason that the contract of August 3 was at a price less than the contract price of July 25—the only contract alleged to have been authorized—*and therefore not made in the interest or to the advantage of Clews & Company.*

The corollary from these postulates is the very obvious one, that if Clews & Company were shown to have "consciously" consented to the change in question, they would be bound by the contract of August 3; or if it could be shown that the contract of August 3 was not to their disadvantage, their assent to it might be presumed. Now, it seems to us easily demonstrated that Clews & Company not only consciously assented to the change, but that the change was not to their disadvantage.

If on the 16th or 20th of July, 1896, Henry Clews & Company had wired their brokers in Chicago to sell 700 shares of the stock of the Diamond Match Company at $222 per share, to be delivered July 31, and their brokers, Schwartz, Dupee & Company had truthfully reported that they had

sold 700 shares of said stock at $222 per share to Jamieson & Company, to be delivered July 31, *and no change or modification of this contract thereafter occurred until the day of delivery*, at which time the shares contracted for had been tendered and refused, it would scarcely be pretended that an action would not lie by Clews & Company against Jamieson & Company for a breach of contract. The defense of want of privity, under such circumstances, would obviously be unavailing.

If on the 25th of July Henry Clews & Company had wired their brokers to obtain, if possible, an extension of time for delivery to the 31st of August following, and the brokers, having obtained the extension, so reported to their principals, this would have been a novation *sub modo* but would not have changed the mutual obligations of the parties.

A transaction such as the above represents the conventional contract of sale for future delivery *unmodified by any customs or usages peculiar to a stock exchange;* and yet so far as a client is concerned *no practical difference exists*. For in both cases the client simply instructs his broker to buy or sell a specified number of shares at a specified price to be delivered at a specified time; he secures his broker by a pledge of money, collateral, or credit in the one case as in the other; in neither case is he obliged to pay further attention to the transaction until the time arrives for delivery, at which time he delivers or receives the number of shares of stock contracted for, and pays or receives the price per share called for by the contract—no more and no less—or, failing to comply with his contract, is legally amenable for the breach.

It is apparent that so far as the client is concerned it is a matter of indifference whether his contract is executed on a

25178

street corner or on the stock exchange, provided, of course, his rights in the latter case be equal to his rights in the former case. He is aware that the stock exchange has methods of doing business peculiar to itself; he has been led to believe that by trading on the exchange rather than on the street, certain advantages will accrue. For instance: The transaction will be had with a member of the exchange who is probably acting for an undisclosed principal, but who nevertheless holds himself personally liable. He is assured that no one can become a member of the exchange until he has been investigated by a committee as to his financial and business standing. To be a member of a stock exchange, therefore, is a valuable credential. He is further given to understand that a ready market is offered for all shares listed upon the exchange, thereby saving the delay and expense of advertising or seeking elsewhere; he is further given to understand that for breach of contract by one of its members it will not be necessary to seek redress in the courts and endure the law's delays or pay the expenses incident thereto, but that prompt redress will be given him, his damages measured by legal standards, and execution enforced out of a trust fund at all times on deposit, or by disciplining the member in default, if need be. He is of course given to understand that the stock exchange is, and will be, at all times, a going concern for the attainment of these objects, Sundays and certain holidays excepted.

Tr. p. 123, Art IV.

Tr. pp. 122 an 123, Art. XV and IV.

Now the methods of doing business on the exchange among the members thereof is of no interest to the client if such methods produce the desired results; but if the doctrines announced in the opinions of the Circuit Court and the Circuit Court of Appeals herein are to obtain—if at its caprice a stock exchange can close its doors and cease indefinitely its usual functions, if a contract with one of its members by some

Tr. p. 123, Art. I.

hokus-pokus or manipulation is made to evaporate and disappear—if every one consenting to deal with its members according to the rules and usages prescribed by themselves is to be, not merely in popular tradition but according to judicial pronouncement, a gambler and a law breaker—then these institutions should be compelled to adopt different methods or be raided by the police.

If we resist a distinct temptation at this point to enter upon a historical consideration of the stock exchange as an institution—its genesis and centuries of development, it is only because we do not feel called upon to vindicate its morals or its modes of operation. The fact that out of the teeming, ceaseless and illimitable business transacted on the stock exchanges of this country almost from its beginning, this is the first time, so far as judicial records show, that the methods and machinery of the stock exchange have been impeached, is proof conclusive that such methods and machinery have been thoughtfully devised for the protection of legal rights. That these methods and machinery have, in particular cases, been perverted and made to cover gambling transactions, notwithstanding the penalties denounced against such dealing (Tr. p. 123, Arts. XVII and XXIX), goes without saying. But that the stock exchange itself, with all its machinery, is as necessary to modern commerce as railways, steamships, telegraphs, money or any other mechanism of exchange, is the deliberate judgment of every writer on political economy; and we respectfully submit that it should be the policy of the courts to bring these institutions and the methods, customs and usages peculiar to them, within judic[illegible]ken.

See Je[illegible]n's Money and the Mechanism of Exchange, Appleton's Ed., pp. 281 and 282, and note.

25179

See also *Political Science Quarterly*, Vol. 8, No. 2, p. 252, June, 1893, where Mr. Alexander D. Noyes, in an article, says:

"The system of clearing houses for stocks is not new. It was adopted in the New York Stock Exchange only in the early months of 1892, but it has been in existence elsewhere for at least twenty-five years. * * * Ordinarily, in the first experiments, they took the form of the so-called 'ringing out' of contracts in the same security. By this plan, if A sold B a given amount of one security, and if B had presently sold the same amount to C, the series of trades could be personally adjusted between the three traders so that the only actual exchange required would be the transfer of the securities from A to C. *Of course, the number of traders in the series might be extended indefinitely, for the system did not require that the prices at which the trades were made should have been uniform.* * * * The first official establishment of this kind in Europe was founded at the Handelskammer of Frankfort, May, 1867, principally for the purpose of dealing in government securities, United States bonds in particular. The Berlin Exchange adopted the system in 1869; Hamburg in 1870; Vienna in 1873, and London in 1876. The Paris Bourse, owing to its peculiar system of limitation on exchange membership, has never established a regular clearing house for stocks, but the same ends are attained by a voluntary comparison of accounts by brokers' representatives, similar in its general workings to the system of bank clearings."

Now while in the case at bar the actual connection of Henry Clews & Company with the Chicago Stock Exchange was most casual, and their interest in *the clicking of its machinery* even more casual, it is true that they had agreed to sell according to the rules, customs and usages of

the exchange, and must be bound thereby; but be it understood that the respondents, Jamieson & Company, members of the exchange, must be equally bound. These rules and usages become part of the contract, and this being so, what follows?

In *Bibb* v. *Allen*, 149 U. S. 481, it was said:

"It is settled by the weight of authority that where a principal sends an order to a broker engaged in an established market or trade, for a deal in that trade, he confers authority upon the broker to deal according to any well established usage in such market or trade, especially when such usage is known to the principal and is fair in itself, and does not change in any essential particular the contract between the principal and agent, or involves no departure from the instructions of the principal; provided the transaction for which the broker is employed is legal in its character, and does not violate any rule of law, good morals, or public policy."

In a note to *Horton* v. *Morgan*, 75 Am. Dec. 326, it was said:

"When the client employs a broker of the stock exchange to transact business he *necessarily* gives him the means to carry it through. The broker can, of course, only do this by making the transaction *in accordance with the course of business prevailing in the exchange* and founded upon the rules and usages of the exchange. It results as a natural consequence, that the client can not avail himself of his supposed ignorance of the way in which business is conducted by brokers."

Says Mr. Dos Passos, in his work on Stock Brokers and Stock Exchanges, Ch. 5, Sub-head 7, p. 315:

"The last step in the transaction (*i. e.*, a sale for the account) is the actual delivery of the stock or securities by

the original seller to the ultimate purchaser. This portion of the business most powerfully illustrates the influence and scope of the usages of the stock exchange upon the contract. * * *

"The usages of the stock exchange produce the legal paradox of a vendor selling to a vendee with whom he does not have any dealings, either personally or through his immediate brokers, and who frequently is not in existence in his character of purchaser when the vendor makes the sale. * * * A stock exchange transaction frequently exhibits a sale made *in præsenti* which takes effect *in futuro*, the place of the first vendee being frequently filled by another person or persons, who may purchase at a price different from that at which the first vendor originally sold.

"All these seeming incongruities result from the usages of the stock exchange and the peculiar course of dealing carried on there. But it will be observed that the rights of a vendor are not in any way infringed or diminished by these ramifications of business."

The learned author further says:

"We have seen that a sale may be made either for money or for the account. * * * *If for the account, a vendor who launches a sale upon the exchange knows, or is presumed to know, that his vendee is not necessarily the person to whom his broker originally makes the sale, but may be a different person purchasing for some intermediate jobber at a subsequent date, and to whom delivery is to be ultimately made.*"

In England several cases have arisen which, it seems to us, throw light on the subject. A most thoroughly considered case is that of *Maxted* v. *Paine*, 6 L. R. E. 132, decided in 1871. The methods therein analyzed are but a step removed from the clearing house methods adopted by the

London Exchange five years later, and more recently by the Chicago Exchange.

The opinion of Judge Blackburn in this case ought to have especial weight, for the learned jurist, as is well known, devoted much attention to the law of sales. The statement of the case of *Maxted* v. *Paine* taken from the syllabus is as follows:

"The plaintiff having through his brokers on the stock exchange sold to the defendant, a jobber, ten shares in Overend, Gurney & Co., Limited, the defendant on the "name day" passed a ticket to the plaintiff's brokers containing the name of G. as the ultimate buyer. No objection was made to the name, and the plaintiff executed a transfer to G. of ten shares. It was afterward discovered that the brokers named on the ticket as G.'s brokers had been instructed to buy by S., and had, in fact, bought a large number of shares for S. as undisclosed principal. The ten shares in question (the dealings not being for specific shares) were delivered to them as part of the shares so purchased; but the name of G. was passed in pursuance of S.'s instructions, and according to an arrangement by which G., who was a person of no means, consented to allow his name to be passed in consideration of a sum of money paid to him. The purchasing brokers as well as the defendant, were ignorant of this arrangement. Calls having been made on the shares which the plaintiff was compelled to pay, and which he was unable to recover from G., he brought this action to recover them from the defendant."

The principal defense was a novation by which defendant was released. Opinions were delivered by BLACKBURN, SMITH, LUSH, JJ., and COCKBURN, C. J. The opinion of Blackburn covers pages 147 to 181 of the report, from which we have extracted the following:

25181

"All contracts on the stock exchange are made by the members among themselves as principals, and though from the fact that one of the parties is a broker, the other would have good reason to believe that there was an undisclosed principal behind, he would not know that for certain, and the contract would have the effect of making the two members liable to each other as principals. *The undisclosed principals of those two members can at law enforce, and are at law liable for the contracts made by their agents.* * * *

It appears by necessary inference, though not expressly stated, that there was a satisfactory settlement in account between all the various members of the stock exchange through whose hands the ticket had passed *as to the different, and probably very different, prices at which they had bought and sold.* On the 13th of April, 1867, more than ten months after the defendant had every reason to believe the transaction was satisfactorily ended (*i. e.*, that there had been a novation and he was discharged as the original purchaser), the plaintiff, for the first time, brought forward facts then recently discovered by him * * * by which it appears, in brief, that Foster & Co.'s client, Sir Samuel Spry, being desirous of evading the liability which he had instructed Foster & Co. to incur on his behalf, had sought out Goss, a person who, as JAMES, V. C., in *Castellan* v. *Hobson*, expresses it, on account of his vacuity might sing in the presence of a vice chancellor, and paid him forty-one pounds ten shillings to allow his name to be sent in as the transferee. Of course Goss has not paid the subsequent calls; the plaintiff has been forced to do so, and the right of action against Goss having been from the first worthless, he sought for redress. * * *

I think no one can read the above statement without

feeling that the plaintiff is entitled to relief from somebody. He has selected the defendant Paine as the person whom he sues. And what we have to determine is whether the defendant is liable. The majority of the court below have held that he is not, and I have come to the same conclusion as the majority of the court, viz., that the judgment should be affirmed; but for reasons of my own, which I think it right to state fully, though the consequence is inconvenient length."

After citing cases intimating that the practice of the stock exchange is no more than machinery by means of which the person buying procures a nominee, the learned judge continues:

"The Court of Appeal, in each of these cases, determined that the practices and usages of the stock exchange were more than such machinery, *and made it part of the contract when the sale was for the account, that there should be a novation.*"

The learned judge then goes on to consider what would have been the effect if the sale had been for cash on the exchange, instead of for the account, and adds, p. 159:

"Having said thus much I am now brought to what is the great question in the cause. What difference does it make that the contract was on the stock exchange for the account? I have no doubt that the plaintiff, now seeking to enforce a contract made on his behalf, must take the contract as it really was, *incorporating in it all the usages relative to such contracts.* And the questions, what are those usages, and what is their extent, and what do they mean, are all questions of fact to be ascertained by evidence. But when once they are ascertained the legal effect of the customs upon the contract is a question of law."

Considering this evidence and the rules of the exchange he says, p. 160:

25182

"And I may state at once that, in my opinion, the whole difficulty in these cases as to bargains for the account arises from this, that those who have framed the rules, and those who by putting them in use have established a practice and understanding which ought to regulate the rights of the parties, *have mainly had in contemplation the establishment of a clearing house, for which they have provided with admirable skill*, and they have also provided for other matters *of every-day occurrence*, such as the *payment of the price*, and the enforcing of the actual delivery of the transfers, though not perhaps quite so skillfully."

* * *

"I will now proceed to state what I understand to be the effect of the rules and usages of the stock exchange. THE GREAT AND MAIN OBJECT OF THE MEMBERS OF THE STOCK EXCHANGE IN ESTABLISHING A PERIODICAL ACCOUNT AND MAKING THEIR RULES AS TO NAME DAYS AND SETTLING DAYS AND TICKETS SEEMS TO ME TO HAVE BEEN THE SAME AS THAT WHICH HAS LED TO THE ESTABLISHMENT OF THE CLEARING HOUSE, AND WHICH I TAKE TO BE THIS, THAT THE NUMBER OF ACTUAL TRANSFERS AND PAYMENTS SHOULD BE REDUCED TO A MINIMUM, AND THAT ALL THAT CAN BE DONE BY SETTING OFF ONE CONTRACT AGAINST ANOTHER, AND SETTLING THEM IN ACCOUNT WITHOUT ANY ACTUAL TRANSFER OR PAYMENT OF CASH, SHOULD BE DONE; AND NOTWITHSTANDING WHAT I CAN NOT HELP THINKING THE MISTAKEN OBJECTIONS OF THE LAWYERS OF THE PAST GENERATION AGAINST SETTLING MATTERS IN ACCOUNT, I THINK THIS IS A LAUDABLE AND CONVENIENT OBJECT.

* * * A member of the stock exchange may also be a broker, who has principals, though their names are never disclosed, and the member of the stock exchange makes the contract as principal, and is personally liable as such. If a broker has made only one contract for one constituent to

sell, and has made only one contract for another to buy, he will require from the person with whom he has the one contract to sell that he should actually relieve his selling constituent of the shares sold, and he will require from the person with whom he has a contract to buy that he shall actually supply his buying constituent with the shares bought, so that in that simple case there is no room for economy in the number of shares actually transferred. But if, as is very commonly the case, the broker has a speculative constituent who enters into many contracts, some to buy and some to sell, in the hope that he may get a profit from the fluctuation of the market, or if he, the broker, has carried over some of these transactions to the next account, it is obvious that the broker will, on the behalf of that constituent, only wish for the transfer of the balance of such shares.

The interest, therefore, which a broker member of the stock exchange has in establishing the principle of the clearing house is the same in kind, though not so extensive in degree, as that which a jobber member has.

In order, therefore, to effectuate the clearing house object the system of "tickets" has been introduced. The 87th rule requires that the "buyer of shares, etc., shall pass a ticket for the same containing the names and address of the buyer in full, before twelve o'clock on the name day, either in the stock exchange or at the office of the seller. * * *

The member into whose hands that ticket is passed may either hold it himself or pass it on in furtherance of a contract made with another member. * * *

It is obvious that in carrying out this arrangement it may happen that a member becomes possessed of a ticket for A and B and C shares, when he is under contract to buy from one member A shares, from another B shares, and

wishes himself actually to deliver C shares, and consequently wishes to pass to his two sellers two separate tickets for A shares and B shares, respectively, and himself to continue holder of a ticket for C shares. To meet this case a power of dividing or splitting the ticket is given, which is mentioned in the 87th and 91st rules."

Speaking of the exchange of tickets, he says:

"*There may be a great many intervening members between the two. The ticket which the member A holds at the end of the name day, bearing on it the name of the member Z as the original issuer, and which contains the name and address of either a member or a non-member as the person into whose name Z intends the shares to be transferred, may have passed through the hands of as many members as might be designated by all the intervening letters of the alphabet, and may have been split a dozen times; and the issuing member may have been a jobber or a broker, and the intervening members may have been brokers or jobbers, or both, and the holding member may be either a broker or a jobber. Still the result will be that the holder of that ticket is brought in contact with the issuer of it, and both must necessarily be members of the stock exchange.* * *

Sandeman & Company, as holders of the ticket, were brought into communication with Foster & Co., as issuers of that ticket, and they mutually dealt with each other as such. I incline to think that in such case the law would imply (or, if not, a jury might, and I would without hesitation find as a fact) that there was a contract between the holder and the issuer of the ticket to perform the reciprocal duties which they owe to each other as such.

This contract, in the language of a pleader before the Common Law Procedure Act, would have been thus expressed: 'In consideration that the holders of the ticket (that is, in this case, Sandeman & Co.), at the request of the issuers (that is, Foster & Co.), promised to treat them as the

issuers and perform to them all things which the holder ought to perform to the issuer, they (Foster & Co.) then promised Sandeman & Co. to perform to them all things which the issuer ought to perform to the holder.'

If the parties entering into this contract were agents (as Sandeman & Co. were for Maxted and Foster & Co. were for Spry) I apprehend their principals, though undisclosed and unknown, would be parties to the contract, and would be subject to the same liability as their agents and entitled to have the same benefit of the contract.

The contract would be implied very much on the same principle as that on which the assignee of a bill of lading receiving the goods is held to contract with the shipowner to pay him the freight originally due from the assignor of that bill of lading.

AND THE CONVENIENCE OF IT IN THE PRESENT CASE MAY BE MADE CLEAR BY SUPPOSING A TO HOLD A TICKET ISSUED BY Z, WHICH HAD PASSED THROUGH THE HANDS OF MEMBERS WHOM WE MAY DESIGNATE BY THE OTHER LETTERS OF THE ALPHABET, AND THAT Z, WITHOUT ANY VALID REASON, REFUSED TO PAY. IF THERE IS NO PRIVITY BETWEEN A AND Z, IT WILL BE NECESSARY IN ORDER TO ENFORCE THE PERFORMANCE OF Z'S DUTY FOR A TO SUE B, B TO SUE C, AND SO ON, TILL ULTIMATELY Y WILL SUE Z, WHO WILL THUS, AT THE EXPENSE OF TWENTY-FIVE LAW SUITS, BE COMPELLED TO PERFORM HIS DUTY BY A PROCESS VERY TROUBLESOME AND COSTLY, WHILST IF THERE IS PRIVITY BETWEEN A AND Z IT MAY BE ENFORCED BY A DIRECT SUIT BETWEEN THOSE PARTIES, AND THIS IMPOSES NO HARDSHIP UPON THE ISSUER OF THE TICKET AS IT ONLY PLACES HIM IN THE SAME POSITION RELATIVELY TO THE HOLDER OF IT IN WHICH HE WOULD HAVE STOOD TOWARD HIS FIRST VENDOR IF THAT VENDOR HAD NEVER PASSED AWAY THE TICKET BUT HAD HIMSELF DELIVERED THE SHARES DIRECT. * * *

25184

Coles v. *Bristowe* and *Grissell* v. *Bristowe*, seem to me to determine that when the transfers have been delivered to the issuing member and the price is fully paid, there is a novation which frees the member who merely passed the ticket from further liability. And *Coles* v. *Bristowe* further determines that this novation does not arise from the voluntary act of the seller in accepting the substituted liability of a third party in accord and satisfaction of his contract. Coles had in that case taken alarm, and given his broker instructions to complete the transaction with Bristowe direct, and not to recognize any sub-purchasers except as nominees of Bristowe. The evidence as to this will be found at p. 151 of *Coles* v. *Bristowe* in Law Rep. 6 Eq. At p. 14 of the report of the case on appeal, in Law Rep. 4 Ch., Lord Cairns deals with this as as an ineffectual attempt to vary a contract already made.

The case therefore decides that it is part of the contract for a sale for the account, that where the price has been paid and the transfers executed to the nominees of the member who issues the ticket, and the transfers have been delivered to the member who issues the ticket, the member passing the ticket is free from further responsibility. * * *

We, sitting in a court of co-ordinate jurisdiction, must hold that there is a 'novatio,' and it only remains open to consider what that 'novatio' is, and subject to what conditions.

It will be seen from what I have written that, in my opinion, the effect of the usage is that the member issuing the ticket is much in the position of one who has issued to his immediate contractor a promissory note, promising to perform to the assign of that promissory note those duties which he would otherwise have had to perform to that immediate contractor.

If there were no custom, the person contracting to take shares would promise to accept from his vendor a transfer, and to indemnify against future calls. The contract on the stock exchange for the account is to supply him on the name day with a ticket which he may either hold or pass on. Each member through whose hands the ticket passes is in a position analogous to the indorsee of that note, and the ultimate assignee who is actually to deliver the shares, is in a position analogous to the holder of that note, and I think that the effect of the custom is that, unless what resembles notice of the dishonor of this note is given within fifteen days (according to the rules), the intermediate indorsers of the ticket are released, and then, and not till then, there is a novatio, in my opinion, between the two members of the stock exchange who are in the position of holder of that ticket and issuer of it. THE STOCK EXCHANGE COULD ONLY REGULATE THE PROCEEDINGS FOR THEIR MEMBERS, BUT IF EITHER OR BOTH OF THOSE MEMBERS WERE AGENTS FOR OTHERS, THE LAW SAYS THAT THE PRINCIPALS, THOUGH UNDISCLOSED, MAY SUE AND ARE LIABLE TO BE SUED TO THE SAME EXTENT AS THEIR AGENTS, AND NO MORE. AND THERE IS NO HARDSHIP ON EITHER PARTY IN A PRACTICE THUS UNDERSTOOD.

THE ISSUING MEMBER AND HIS PRINCIPAL HAVE NO ADDITIONAL BURTHEN OR OBLIGATION THROWN ON THEM; THE ONLY DIFFERENCE IS THAT THEY ARE LIABLE FOR THE FULFILLMENT OF THE SAME DUTIES TO ANOTHER PERSON. THE PRINCIPAL WHO INSTRUCTED HIS BROKER TO SELL, AUTHORIZED HIM TO CONTRACT WITH ANY MEMBER OF THE STOCK EXCHANGE, AND AFTER THE FIFTEEN DAYS HAVE ELAPSED, HE HAS THE SAME RIGHTS AGAINST THE ISSUER OF THE TICKET, WHO MUST NECESSARILY BE A MEMBER, THAT HE WOULD HAVE HAD AGAINST HIM IF THE CONTRACT HAD BEEN IN THE FIRST INSTANCE MADE

25185

WITH THAT MEMBER. AND THE CONVENIENCE AND SECURITY GIVEN TO THOSE WHO PASS THE TICKETS, BY A CUSTOM WHICH SECURES THAT THE FULL EXTENT OF THEIR LIABILITY ON EACH ACCOUNT SHALL BE FINALLY ASCERTAINED WITHIN FIFTEEN DAYS, IS OBVIOUS AND GREAT."

And the learned judge concludes his elaborate opinion in the following words:

"THE WHOLE MACHINERY OF THE STOCK EXCHANGE IS BASED ON THIS, THAT THE MEMBERS DEAL WITH EACH OTHER, AND ARE LIABLE TO EACH OTHER AS PRINCIPALS.

IT SEEMS TO ME THAT THE ULTIMATE NOVATION BY THE CUSTOM MUST BE BETWEEN THE MEMBERS, AND THAT WHEN IT TAKES PLACE IT PUTS THE MEMBER ISSUING THE TICKET UNDER AN OBLIGATION TO FULFILL EXACTLY THAT DUTY WHICH BEFORE THAT NOVATION HE WOULD HAVE HAD TO FULFILL TO THE MEMBER WITH WHOM HE HAD ORIGINALLY CONTRACTED."

The case from which we have thus ventured to quote so extensively decides five points:

1. That a contract for the sale of stock for the account is a contract in which the rules and customs of the stock exchange have been incorporated.

2. That the undertaking of the broker under such a contract is to furnish an ultimate purchaser and not any particular purchaser, or an ultimate buyer and not any particular buyer, as the case may be.

3. That between the date of the original contract and the date of its maturity various persons at various prices may become liable thereunder through a process of novation.

4. That the mere offer of a name, under the rules of the London Stock Exchange, does not work a substitution or a novation unless accepted, but that the lapse of fifteen days

without objection conclusively presumes acceptance, releasing the party theretofore liable.

5. That the brokers nominally dealing between themselves are, nevertheless, liable to the undisclosed principals of each, and the undisclosed principals to each other.

In *Hodgkinson* v. *Kelly*, L. R. 6 Eq. 496, which is regarded as the leading authority in England on the subject, A bought of a jobber on the stock exchange shares in a certain company; and afterward (the company in the meantime having stopped payment) B sold to another jobber shares in the same company at a lower price for the same settling day. On the name day A's name was given to B as the purchaser of B's shares. B executed a transfer of the shares to A and delivered the transfer and certificate to A's broker, who paid the price for which A purchased the shares; A afterward repaid his own broker and took away the transfer and certificates, but did not execute the transfer, and it was never registered, in consequence of which B was compelled to pay certain "calls." B brought action against A to indemnify him against all consequences flowing from the ownership of the shares subsequent to the execution of the transfer.

The court, per ROMILLY, M. R., sustained the action, and a decree was entered for the plaintiff, the opinion of the court in part reading:

"It is not, as has been supposed, that the seller of shares constitutes an agent to find out and enter into a contract with some particular buyer, or on the other hand, that the buyer does the same as to the seller, *but both parties agree to be bound by the usage of the stock exchange, which binds both parties from the beginning, but which leaves each of the parties to the eventual contract ignorant of the other until the day arrives and the instrument of transfer is executed.* It was put in argument as re-

25186

sembling a contract by which A sells to B, B to C, C to D and D to E; and at the request of B, C and D, A executes the transfer to E; but, in truth, this does not appear to me to put the case sufficiently high. IT IS, IN MY OPINION, AN ENGAGEMENT ENTERED INTO BY A ON ONE SIDE, AND E ON THE OTHER, THAT THROUGH THE INSTRUMENTALITY OF CERTAIN OTHER PERSONS, WHOEVER THEY MAY BE, CERTAIN SHARES SHALL BE SOLD AND BOUGHT, AND THEY UNDERTAKE TO COMPLETE THE CONTRACT WITH THE PERSON, WHOEVER HE MAY BE, WHO BUYS ON ONE HAND AND SELLS ON THE OTHER."

The court held that these usages were founded on common sense and common honesty, and that it was of no importance to A to know to whom his shares are to be transferred, nor is it to B to know from whence the shares come.

The machinery of the clearing house while seemingly complicated is, like nearly all machinery, very simple in its principles when once understood. IT MEANS A CONVENTIONAL CONTRACT OF SALE FOR FUTURE DELIVERY NOVATED EVERY DAY UNTIL THE DAY OF DELIVERY. Here is all the mystery there is to it.

There can be no doubt that a party contracting in his own name and on his own account has the legal right to novate a contract every hour of the day and every day in the week, substituting a new contract for the one canceled; *and it seems to us equally clear that what a person can thus do for himself, he can authorize another to do for him and be equally bound by the acts so authorized.*

Let us assume that on July 25, 1896, Schwartz, Dupee & Company had received from Clews & Company a telegraphic message, reading substantially as follows:

"Sell to whomsoever you think responsible 700 shares of Diamond Match Stock at $229 per share, to be delivered August 31st. If the person to whom you sell for any rea-

son desires subsequently to cancel the contract and you can find some one to take it off his hands at a lower price, you are authorized to cancel the original contract and accept a substituted purchaser in the stead of the first purchaser, provided you are paid the difference in money. The money, of course, you will hold to our use. If the second purchaser in turn should wish to withdraw, and you or he can find some one willing to take the shares at a still lower price, you are authorized to cancel the existing contract, as before, and in like manner accept the third purchaser, provided you are paid the difference in cash. And this you may do on like terms whenever and as often as you may see fit. On the other hand if you deem it expedient to cancel the existing contract with whomsoever it may be, and obtain a contract at an advanced price, you are authorized to make such a novation and to pay and charge to our account whatever it costs to obtain such a contract and this you are also authorized to do whenever and as often as you may deem expedient."

Now, however unusual such instructions may sound in the ears of the lawyer accustomed only to the conventional relationship of principal and agent, it can not be said that there is anything vague or indefinite or dubious about the language employed. The meaning is plain. Neither is there anything wicked, unlawful or *dolus malus* about these instructions. The only question is, can the instructions be carried out so that at all times there will exist between the principal and the person with whom the agent contracts the relationship of vendor and vendee with a privity of contract?

Assume that the agent attempts to carry out these instructions. On July 25, 1896, he sells as instructed, but in his own name, without disclosing his principal, 700 shares of Diamond Match stock to A at $229 per share, to be

25187

delivered August 31st. That the undisclosed principal would have a right of action against A for breach of this contract will not be disputed. On July 26th, however, A comes to the agent (the ostensible principal) and asks to recede from his contract, stating that B will take it off his hands at $228 per share, and that he (A) will pay the difference in cash. The agent looks at his written instructions to see if he is authorized to make such a novation. He finds the authority plainly given, in so many words, and so he consents to the arrangement, cancels the contract with A, receives the difference in price, to wit $1 per share, which he holds to the use of his principal, and enters into a new contract with B for $228 per share. *Can it be doubted that thenceforth there is the same privity between the undisclosed principal and B that had the day before existed between A and the undisclosed principal? The authority given to the agent was a continuing authority. It was as much a sanction of his particular act as though special instructions had been given him respecting the identical transaction.* If, therefore, on July 27th, B should come to the agent and request the privilege of withdrawing from his contract, offering as substitute C, who would take it off his hands at $227 per share, and should moreover offer to pay the difference in cash, the agent would have ample power to make the novation; for if he could make it once he could make it twice, and if he could make it twice he could make it every day in the month until the very day of delivery.

Assuming, then, that on August 3, C should come to the agent (the ostensible principal) and should ask consent to recede from his contract, offering Jamieson & Company as substitutes at $222 per share, agreeing to pay the difference in cash, would not the agent have authority to cancel the contract with C and enter into a new contract with Jamie-

son & Company at $222 per share, receiving the difference in price in cash, to the use of his principal, so that there should be thenceforth an absolute privity of contract between them (the principal) and Jamieson & Company?

The instructions actually given by Clews & Company to their agents, Schwartz, Dupee & Company, in the case at bar, were in all respects similar to those which we have assumed, and Schwartz, Dupee and Company did, under their instructions, only what they were authorized to do. To be sure, their instructions were not written out *in extenso*, but they were just as explicit, just as full, just as easy of comprehension as though they had been.

In the English cases there have been several attempts to set forth the precise terms of the contract between a broker and his client on a trade for the account under the rules and usages of the stock exchange.

In *Sheppard* v. *Murphy*, 16 W. R. 948, which was an action in equity brought by the vendor against an ultimate purchaser, the court held, in answer to the argument that there was no privity between the plaintiff and the defendant, that the nature of a transaction on a stock exchange by which a vendor of securities was brought into contact with an ultimate purchaser, was not a contract between the possessor of a thing at the time and another party for the delivery of a specific thing, but a contract that the person who enters into it shall, upon the day on which it is to be performed, procure persons to do a thing that he undertakes shall be done, and that upon that occasion the person who is to receive this thing, and not until that day, shall pay these persons and not the person who has made the bargain at all.

If we might venture to express the terms of the contracts between a broker and his principal, and between a broker

25188

and the fellow broker with whom he deals in a trade for the account, and in view of the rules, customs and usages of the Chicago Stock Exchange, we would say, that every stock broker, in effect, promises to give to his principal on the day of delivery the name of a purchaser, or the names of purchasers, as the case may be, a member or members of the exchange, contracting to receive and pay for the number of shares which the principal ordered sold at the price authorized, or at a different price; *provided*, however, that if the price to be paid by the purchaser or purchasers named is *less* than the price authorized, the broker will have on hand to the credit of his principal the difference in money; and *provided*, further, that if the price to be paid is *more* than the price authorized, the principal will have paid to the broker the difference in money. The principal on his part agrees, in effect, to accept the purchaser or purchasers so tendered, on the terms proposed, and deliver to him the certificates of stock. Between themselves the brokers mutually agree that they will account to each other, or with those whom they may designate as principals, on the day of accounting.

B.—Ratification.

If we assume with the lower court that the only contract authorized by Clews & Company was the sale of 700 shares of Diamond Match stock at $229 per share, and that therefore the sale of August 3rd at $222 per share was not sanctioned by the petitioners, it is evident that the petitioners are here seeking to ratify and adopt the latter contract, which their agents, however unauthorized, assert to have been made on petitioners' account.

But the trial judge, after holding that the petitioners could not have been bound by the action of their agents

(inasmuch as such action was unwarranted), further holds that the petitioners could not even *ratify* the unauthorized act of their agents. His language is as follows:

"But if the defendants, under the substitution, could not hold the complainants as principals to the contract for the sale at $222, *then for want of mutuality the complainants are in no position to hold the defendants.* There is, indeed, no identity of contract between the one the complainants authorized and the one entered into between Schwartz, Dupee & Company and the defendants. *That the complainants now choose to accept it is of no significance:* the legal fact remains that they are not so bound, and not being so bound, the defendants, on their part, are not legally bound."

We respectfully submit that this logic would do away entirely with the doctrine of ratification. Ratification presupposes an unauthorized act on the part of an agent. It presupposes that the principal is not bound *ab initio*. Consequently it presupposes that there is a time, a *locus penitentiæ*, so to speak, when there is no privity or mutuality between the principal and the party with whom his agent affected to contract in his behalf. The contract in all such cases is, pending ratification, a contract between the agent and the other party. But we have read our text books to little purpose if the law does not give the option to the principal, under such circumstances, to either repudiate or ratify the contract. If he ratifies, he adopts, as his own, the contract made by his agent and assumes it *cum onere*, that is to say, subject to all defenses which could be made in any suit by the agent himself. After ratification the principal, of course, is bound, and so is the party with whom his agent contracted. Thenceforth there *is* a privity. Indeed, *by fiction of law the ratification relates back to the very inception of the contract.*

The objection urged by the trial judge would apply equally to the contract of an infant who, apparently, is bound or not bound according to his caprice. And yet, as pointed out by Mr. Wharton (Contracts, Sec. 2), the want of mutuality must inhere in the contract itself in order to avoid it, and not depend upon the mere contingency that it may, or may not, be avoided.

Speaking on this subject he says (Idem):

"It is also said that exceptions to the rule requiring mutuality are to be found in cases where one of the parties can defend under the statute of frauds, *and in cases where an agent turns out to be acting for a principal subsequently disclosed.* But in all these cases the question of liability is raised by confession and avoidance; and if we are told that there is no contract in such cases, we must hold that there is no contract in any case in which one of the parties could interpose a good defense, no matter what that defense may be. *In all these cases also the ratification* (or non-repudiation, as it is more properly called) *does not start a new contract; it merely confirms* [and adopts?] *a contract already existing.*"

In commenting on the case of *Hagerdorn* v. *Oliverson*, 2 Maule & S. 485, where an unauthorized person, acting as a *negotiorum gestor*, obtained an insurance on a ship for the benefit of the owner, and the ship was subsequently lost, and where it was held that the owner could afterward ratify the insurance, though he would not have been bound to have paid the premium, Mr. Wharton observes (Agency, Sec. 81):

"At the first glance this would appear to have been a case in which the owner was able to play fast and loose; to say, 'if the vessel is lost, I am insured; if she is not lost, I am not insured.' But this view is only superficial. Though *personally* the owner might have had this choice,

the contract itself was absolute. The insurer who insures a ship in consideration of a premium paid in, agrees to do something for a valuable and adequate consideration. *He insures for whomsoever it may concern.* His duties are fixed on the closing of the contract. * * * WHETHER THE OWNER CAN SUE UPON THE CONTRACT IS A MERE MATTER OF FORM, FOR THE AGENT CAN SUE IN CASE THE PRINCIPAL CAN NOT. The insurer has lost nothing by the fact of the agent being unauthorized; he has been lulled into no false security; no intervening rights have been sacrificed by him. He insured the vessel on his own terms, and by those terms he is bound."

Justice FIELD, in *Cook* v. *Tullis*, 18 Wall. 338, observes:

"The general rule as to the ratification by one of the unauthorized act of another respecting the property of the former, is well settled. The ratification operates upon the act ratified *precisely as though authority to do the act had been previously given*, except where the rights of third parties have intervened between the act and ratification. * * *

"As is said in one of the cases cited by counsel, * * * 'the ratification is the first proceeding by which he (the principal ratifying) *becomes a party to the transaction;* he can not acquire or confer the rights resulting from that transaction unless in a position to enter upon a similar transaction himself.' Thus, if the individual pretending to be the agent of another should enter into a contract for the sale of land for his assumed principal, it would be impossible for the latter to ratify the contract if between its date and the attempted ratification he had himself disposed of the property."

A suit begun by the principal upon the contract of his agent has uniformly been held to be a ratification. The case of *Shoninger et al.* v. *Peabody*, 17 Atlantic Rep. 279 (a Con-

25190

necticut case, decided in 1889), will serve as an illustration of the general doctrine. An agent of a piano firm, operating a branch store under a salary and a contract for commission, sold to the defendant a piano, with the agreement that the defendant should pay for it in commissions as a stock broker in various transactions between him and the defendant. To his principals, the plaintiffs, the agent reported the piano as rented to the defendant. After the defalcation of the agent and the winding up of his business, the plaintiffs learned of the true nature of the transaction. They were evidently poorly advised, for instead of repudiating the transaction and seeking to recover the property in replevin, or its value in trover, they sued in assumpsit for the agreed price. Said the court, per LOOMIS, J.:

"The manifest wrong and injustice perpetrated upon the plaintiffs by the defendant and Day (the agent), make us regret that the principles of law applicable to the remedy chosen by the plaintiffs are not flexible enough to afford relief. * * * The whole trouble in this case arises from a mistake as to the plaintiffs' remedy. When the plaintiffs were informed of the terms of the contract made by their agent for the sale of the piano to the defendant, they had an election to repudiate the arrangement, and, by tendering back what they had received in ignorance of the terms of the sale, and demanding the piano, they could have recovered it by an action of replevin, or obtained its value in trover. But, knowing the terms of the sale, they elected to sue in assumpsit on the contract for the agreed price, and thereby they affirmed the contract and ratified the act of the agent, precisely as if it had been expressly approved upon being reported to them by the agent or the defendant; and in contemplation of law *a subsequent ratification and*

adoption of an act has relation back to the time of the act, and is tantamount to a prior command."

It is true the doctrine announced by his honor, Judge GROSSCUP, is supported by Mr. Mechem in his work on Agency, Sec. 179, where the learned author says:

"If an agent, without authority, enter into a contract with another, by which, on account of such lack of authority, the alleged principal is not bound, the principal can not, when he afterward finds that the contract is advantageous to him, affirm the contract so made and compel the other party to perform it on his part."

The reason which the author assigns for the rule announced, is the same as that given by Judge GROSSCUP, and is as follows:

"As a rule the obligations of a contract must be mutual; both parties must be bound or neither. Hence, if the contract made by the agent was not binding upon the principal because of the agent's want of authority, the contract lacks this element of mutuality and the principal not being bound the other party is free also."

The principal case cited by the author in support of his doctrine is *Dodge* v. *Hopkins*, 14 Wis. p. 630. This case has been criticised by Mr. Freeman in a learned note to *Allen* v. *Bartholomew*, 5 Am. State Reports, p. 109, and defended by Mr. Mechem in an article in the 24th American Law Review, p. 450, criticised in an article in the 25th Am. L. R., p. 74, and in an article in the 9th Harvard L. R., p. 64.

From the article in 25th A. L. R., p. 74, we quote as follows:

"The writer believes the correct doctrine to be that announced by Mr. Wharton.

"It is the only view which allows full force to the maxim, '*Omnis ratihabitio retrotrahitur et mandato priori æquiparatur*.

23191

On all hands it is admitted that the ratification of the principal relates to the time of the contract and is equivalent to a previous authority to the agent. From the ratification the principal becomes, for all purposes, bound by the contract from the time of its execution. If, then, the other party be not bound from such time, the ratification is not, as to such party, equivalent to a previous authority. The maxim in such case would be only half-way true. No such right accrues to the principal as would have accrued to him had there been a prior command, and no such liability devolves upon the other party as would have devolved upon him had there been a prior command. At the same time the same liability devolves upon the principal as would have devolved upon him had there been a prior command, and the same benefits accrue to the other party as would have accrued to him had there been a prior command. But this is not mutuality and mutuality is the essence of Mr. Mechem's rule. Thus, in a very important sense, such ratification is not equivalent to a previous authority. Had there been a previous authority both parties would have been bound from the time of the contract.

"But, Mr. Mechem objects, 'as a rule the obligations of a contract must be mutual; both parties must be bound or neither.' Yes, this is the rule, but there are numerous exceptions to it; or, more properly, this is a generalization inapplicable at times to many cases. Why may not the present case be one of them?

"Let us suppose for a moment that it is not. Then the argument of Mr. Mechem is suicidal. The sword has two edges and cuts both ways. He maintains that the principal is bound from the time of his ratification, but the other party is not bound until his own subsequent ratification. During the time that elapses between

these ratifications the principal is bound while the other party is not. But where is the mutuality of this? He maintains that the principal can not by his ratification 'bind the other party also to the contract.' How, then, can the other party by his ratification bind the principal to the contract? Where is the mutuality of this? Ratification is an *agreement*, express or implied, to adopt an act performed by another for us.

"Certainly we may question the consistency of Chief Justice DIXON when, in *Dodge* v. *Hopkins*, he strongly declares for this doctrine of mutual obligation and yet, in seeking to avoid the force of the cases to the contrary, he uses this language: 'The inaccuracy consists in not properly distinguishing between those cases where the subsequent act of ratification is put forth as *the foundation of a right in favor* of the party who has ratified, and those where it is made the basis of a demand *against* him.' There is not much mutuality in this distinction.

"In Mr. Mechem's view of the case ratification is impossible. The principal before his ratification is not bound, because the act of the agent was unauthorized. The other party is not bound, because the obligation of contracts must be mutual and the principal is not bound. The principal after his ratification and before the ratification of the other party is not bound, because his ratification can not bind the other party, and the other party remains unbound and the obligations of contracts must be mutual. To hold otherwise would be to hold that one party was bound when the other was not. Nor can he be bound from the ratification of the other party until his own second ratification, because 'it can not rest with one party alone to bind the other party also to the contract.' Nor can he be bound at the time of his second ratification, because up to that time

he was not bound and the other party, in consequence, could not be, and his act could not bind the other party. And so on *ad infinitum* * * * The conclusion must be that Wharton is right or that the contract is necessarily and forever a nullity. The latter will be admitted by no one. The former, then, must be true."

On principle, we should say that the doctrine of ratification ought not to be over-refined. In the case at bar, Schwartz, Dupee & Company could have assigned their contract with Jamieson & Company and the assignee could have sued thereon, taking the contract *cum onere*, that is to say, subject to all defenses which could have been made in a suit by the assignor; the practical effect of ratification is therefore the same as an assignment.

Jamieson & Company knew, of course, that Schwartz, Dupee & Company were brokers and in all probability acting for undisclosed principals. They contracted with them and with whomsoever they might claim to represent.

C.—Petitioners' Right to Their Agent's Remedies.

If it were true that on the 25th of July, 1896, Schwartz, Dupee & Company, as agents for the petitioners, obtained for them a contract for the sale of 700 shares of Diamond Match stock at $229 per share, the petitioners furnishing seven thousand dollars cash to secure the same, and, as we have seen, some four thousand dollars cash to obtain the same—if it were true that, without authority from the petitioners, Schwartz, Dupee & Company bartered, and thereby canceled, this contract for the contract of August 3rd at $222 per share, which they made in their own name and in their own right, still using seven thousand dollars ($7,000) of petitioners' money to secure the same, then Schwartz, Dupee & Company would have been

guilty of a fraud in law whatever might have been their intention in fact. A contract—a chose in action—is *property*. If an agent converts the property of his principal into other property of a like or unlike kind, taking the title thereto in his own name and to his own use, it is a fraud upon the principal, and the law regards him as a trustee for the principal to the extent of the property so obtained.

The case of *Cook* v. *Tullis*, already cited, is an authority in point:

"Now, it is a rule of equity jurisprudence," says the opinion of Mr. Justice FIELD, page 341, "perfectly well settled and of universal application, that where property held upon any trust to keep or use or invest it in a particular way, is misapplied by the trustee and converted into different property, or is sold and the proceeds are thus invested, the property may be followed wherever it can be traced through its transformations, and will be subject, when found in its new form, to the rights of the original owner or *cestui que trusts*."

The doctrine is thus stated by Mr. Pomeroy in his work on Equity Jurisprudence, Vol. 2, Sec. 1051:

"If an *agent* or bailee wrongfully disposes of his principal's securities, and with the proceeds purchases other securities in his own name, in these and all similar cases equity impresses a constructive trust upon the new form or species of property, not only while it is in the hands of the original wrong-doer, but as long as it can be followed and identified in whosoever hands it may come, except into those of a *bona fide* purchaser for value and without notice; and the court will enforce the constructive trust for the benefit of the beneficiary owner or original *cestui que trust* who has thus been defrauded."

D.—The Duty of Equity to End Litigation.

All parties in interest were before the court. The finding of the referee and of the trial judge is, that on the 3d day of August, "there came into existence by the transactions stated a contract, whereby primarily between Schwartz, Dupee & Company and the defendants (Jamieson & Company), the latter were obliged to purchase of the former and the former were obliged to sell to the latter during the month, 700 shares of this stock at the price of $222 per share."

"Nor can there be any doubt," says the opinion, "that the undisclosed principals of either of these parties were entitled to step into the places of these respective brokers, and in their own name and for their own benefit insist upon the enforcement of the contract according to its terms."

Did Schwartz, Dupee & Company represent any principals in this transaction or was the contract made on their own behalf? They claim, both in the evidence and in their answer, to have acted on behalf of the petitioners. They disclaim any interest in the contract whatever, or in the fourteen thousand dollars deposited to secure it. The testimony further discloses that while it is true Schwartz, Dupee & Company were accountable to the petitioners under the contract of July 25, 1896, for the sale of 700 shares of Diamond Match stock, at $229 per share, the petitioners had received in cash the difference between said number of shares at $229 and $222, *so that Schwartz, Dupee & Company, in any event, would be liable only to them for the precise amount here involved.* Is it possible that, under such circumstances, respondents can escape liability, because Schwartz, Dupee & Company, whom they confessedly owe, disclaim all interest in the contract, and on that account refuse to sue, or file a cross-bill?

Had they filed a cross-bill in this case against respond-

ents they would have been entitled to recover; but it goes without saying that where all the parties in interest are before the court and an end to the matter can not be made for insufficiency of pleading, a court of equity may order a cross-bill to be filed, and in one case, at least, a decree was reversed because the court neglected of its own motion to order the filing of a cross-bill, in order that there might be an end to litigation.

See *Sims* v. *Burke*, 109 Ind. 214.

Chamley v. *Lord Dunsany et al.*, 2 Shoales & Lefroy's Rep. 689, was decided by the House of Lords in 1807, on an appeal by Chamley. The facts in the case were rather complicated, as will appear from a reading of the various opinions; "a case more entangled," said Lord ERSKINE, "than any other I ever had to consider."

For an understanding of the particular point to which we cite the case, the facts may be summarized as follows:

Messrs. Latouche had taken possession of the property of one Warren under a grant *in custodiam* of his estates. The custodian process, peculiar to Ireland at that time, is thus described by Lord REDESDALE (p. 694), and heartily condemned by him as iniquitously oppressive:

"In order to have a custodian the person who is the creditor proceeds to outlaw the debtor, and then the creditor obtains from the exchequer a grant of the debtor's estate, which is forfeited to the crown by means of the debtor's outlawry. The creditor having obtained the grant *in custodiam*, is put in possession of all the debtor's lands, and all the tenants to the estate are bound to pay their rents to him; and all prior creditors are excluded till such custodee is satisfied."

By a series of fraudulent dealings the appellant, Cham-

25194

ley, who was the attorney for the outlaw, Warren, obtained possession of a portion of the estate with the Messrs. Latouche. The Messrs. Latouche, with the fatuity of scoundrels, brought suit against subsequent mortgagees and judgment creditors of Warren, Lord Dunsany being the particular object of attack, and fraudulently obtained a master's report which would make their holding of Warren's estate practically perpetual. Lord Dunsany commenced a cross-suit. *In both these suits Warren was party defendant, but set up no claim on his own account nor did he ask affirmative relief.* From a decree pronouncing Chamley's claims to the land fraudulent, and his possession and receipt of the rents likewise fraudulent, and requiring him to account to Warren, the proceeds to go to Warren's creditors, Chamley appealed.

He urged six reasons why the decree should be reversed, the fourth and fifth (p. 691) reading as follows:

"4. That if any money was due from the appellant to Warren, the personal representative of Warren is the person to recover it, and not the respondents as creditors.

"5. For that so much of the decree as directed an account between the appellant and the co-defendants, Messrs. Latouche, was not warranted by the practice of the court, being a decree between co-defendants."

On these points Lord REDESDALE, in an opinion both luminous and voluminous, says, p. 708:

"A court of equity must pronounce its decree according to the case made and proved; and if such case and proof show that the property was held fraudulently, or in trust, or both, as in this very peculiar case, the court must so declare, and act upon it accordingly; and instead of such a declaration being objectionable, it appears to me to be the duty of a court to make it, in order to prevent a multiplicity of suits."

And further, p. 709:

"*But it seems strange to object to a decree because it is between co-defendants, when it is grounded on evidence between plaintiffs and defendants. It is a jurisdiction long settled, and acted on, and the constant practice of a court of equity; so much so that it is quite unnecessary to state any case in its support.*"

And Lord ELDON, acquiescing in these views, states, p. 718:

"It is said that a decree is made between defendants, and that such is contrary to the practice of a court of equity, because there can not be a cross-examination between co-defendants. I dwell on this objection because it has been made by the solicitor general, whose arguments are entitled to the very highest respect. Whatever he says must have considerable weight with this house, and with no member of it more than myself, who have had such opportunities of learning the extent of his talents. But, my lords, *where a case is made out between defendants by evidence arising from pleadings and proofs between plaintiffs and defendants, a court of equity is entitled to make a decree between the defendants.* FURTHER, MY LORDS, A COURT OF EQUITY IS BOUND TO DO SO. *The defendant chargeable has a right to do so. The defendant chargeable has a right to insist that he shall not be liable to be made defendant in another suit for the same matter that may then be decided between him and his co-defendant. And the co-defendant may insist that he shall not be obliged to institute another suit, for a matter that may be then adjusted between the defendants.* AND IF A COURT OF EQUITY REFUSED SO TO DECREE, IT WOULD BE GOOD CAUSE OF APPEAL BY EITHER DEFENDANT."

II.

THE REMEDY PROVIDED BY THE RULES OF THE STOCK EXCHANGE FOR BREACH OF CONTRACT DOES NOT OUST THE COURTS OF JURISDICTION FOR THE FOLLOWING REASONS:

1. THE RULES DO NOT DECLARE SUCH REMEDY TO BE EXCLUSIVE.

2. SUCH A PROVISION IN A CONTRACT WOULD BE AGAINST PUBLIC POLICY AND VOIDABLE.

3. PARTICULARLY IN VIEW OF THE INDEFINITE CLOSING OF THE STOCK EXCHANGE.

The rules of the Chicago Stock Exchange provide a remedy upon the breach of any contract made in pursuance of its rules, which remedy is, ordinarily, just, adequate and summary. Indeed, the measure of damages provided by the rules is the legal measure, and the enforcement of the remedy is far more expeditious and inexpensive than the usual law suit. These considerations account in large measure, perhaps altogether, for the fact that our law reports reveal so few cases growing out of transactions on the stock exchange; but if no case can be found where a court has assumed jurisdiction and furnished a remedy, neither is there any case where a court has refused to do so, and the question is one, therefore, to be determined upon its merits.

1. *The remedy under the rules does not purport to be exclusive.*

Article VII of the by-laws provides: Tr. p. 123.

"Section 1. All deliveries of securities must be made between 11 A. M. and 1:30 P. M., or the buyer may demand that they shall lie over until the next day without interest, when they shall be delivered before 10:30 o'clock A. M., and when deliveries are not made by that time the contract *may*

be closed under the rule, after due notice to the defaulting party, as provided in Article XVII of the by-laws."

Here, obviously, there is given the *privilege* to the party not in default of availing himself of the remedy provided by the by-laws. So far from being exclusive or compulsory, the remedy is permissive only.

Tr. p. 124.

Article XVII of the by-laws referred to in the foregoing, and pleaded by Jamieson & Company in their answer, provides the *method* of closing contracts under the rule. The material parts of it are as follows:

"Should any member neglect to fulfill his contract on the day it becomes due, the party or parties contracting with him *shall*, after giving notice as required by section 2 of the preceding article, employ an officer of the board to close the same forthwith in the exchange by purchase or sale, as the case may require, unless the price of settlement has been agreed upon by the contracting parties."

It is contended by Jamieson & Company that the word "shall" ought to be construed as "must." This is perhaps true in one sense, but not true in another. It is entirely proper, in attempting to provide a remedy, that certain methods and modes of procedure should be prescribed, and it is equally proper that those wishing to avail themselves of the remedy thus provided should be compelled to pursue the methods pointed out. In this sense, therefore, the word "shall" in the 17th by-law may properly be construed as "must"; but this is a long ways from construing the remedy as exclusive, or requiring the party to resort to it. The word "shall" is as frequently construed to mean "may" as "must," and we submit that where the jurisdiction of courts is sought to be vitiated by a contract to arbitrate, the language employed should admit of no qualification. We have seen that article VII, so far from making

the remedy exclusive, simply gives a party the privilege of availing himself of it, and the very next sentence succeeding the one above quoted from article XVII makes equally plain the intention of the rules to confer a privilege rather than to impose an obligation. The language is as follows:

"*In case of a failure of a creditor to close the contract as above* —" what will happen? Will his remedy be gone? Will his resort to the courts be forestalled? Will he lose the advantages of his contract? Not at all:

"In case of a failure of a creditor to close the contract as above, *the price shall be fixed by the price current at the time such contract ought to have been closed under the rule.*"

This is the mere affirmation of the legal rule. All that the law would permit as a recovery upon such a contract is the difference between the contract price and the current price at the day the contract ought to have been performed. If on the 31st day of August, 1896, or thereabouts, the Chicago Stock Exchange had been in operation, and sales of Diamond Match stock had been made thereon, *the price current at that time* would have afforded the measure of recovery.

The next sentence to the one last quoted is equally significant:

"In all cases where an officer *may* be directed to buy or sell securities under this rule, the name of the member defaulting, as well as that of the member giving the order shall be announced. No order for the purchase or sale of securities under this rule *shall be executed* unless made out in writing over the signature *of the party giving the order, who shall state the reason therefor;* and it shall be the duty of the officer who executes the order to indorse thereon the name of the purchaser or seller, the price and the hour at which the contract is closed, and hand the same to the secretary of the board, who shall, within twenty-four hours,

ascertain whether the party for whose account the order was given has paid the difference, if any, arising from the transaction; if not, the secretary shall report the default to the president. The duty devolved upon the officers of the exchange under this rule shall be performed without charge."

The rule proceeds to denounce certain penalties against members who shall directly or indirectly delay, hinder or evade the prompt fulfillment of such contracts. In other words, the remedy provided by the rule is not only in itself as just and adequate as the law would provide, but there is every inducement held out to the members to avail themselves of it; such as enforcing the remedy free of charge, without delay, and coercing payment of damages by discipline or expulsion. But nowhere in this rule, or any other, is there anything which, in our opinion, can fairly be construed as making the remedy provided by the rules, exclusive.

2. *An agreement to arbitrate which would oust the courts of jurisdiction is void, i. e. voidable.*

To plead a remedy provided by contract in bar to a suit at law or equity is equivalent to asking specific performance of the agreement to arbitrate, and the courts have uniformly held that specific performance of an agreement to arbitrate will not be decreed.

Gourley v. *Duke of Somerset*, 19 Ves. Jr. 429.

Dos Passos on Stock Brokers and Stock Exchanges, pp. 78 to 83.

In *Waugh* v. *Schlenk*, 23 Ill. App. 433, the court say:

"No consent of the parties can confer upon a court the power to adjudicate upon the rights of parties where the law does not confer it; neither can the agreement of parties

deprive the court of a jurisdiction conferred by the law when either of the parties seeks its aid to determine its rights. Courts can not allow their jurisdiction to be thus destroyed," etc.

When the contract distinctly provides that arbitration shall be *a condition precedent to the right of action*, various courts have held the condition valid; but such condition can not be pleaded in bar unless clearly made a condition precedent to the existence of the right of action.

See *Birmingham Fire Insurance Co.* v. *Pulver*, 126 Ill. 338.

Even in such cases it has been held that where the party in default *denies all liability*, the agreement to arbitrate *as a condition precedent*, is no bar.

See *Metz* v. *Armenia Fire Insurance Co.*, 79 Pa. St. 478; S. C., 21 Am. Rep. 80, per Sharswood, J.

Scott v. *Avery*, 5 H. of L. Cas. 811, is the leading case on this question and is quoted with approval in *Home Insurance Company* v. *Morse*, 20 Wall. 445.

See also *Kinney* v. *B. & O. Employes' Association*, 25 W. Va. 385; S. C., 15 L. R. A. 142.

3. *Closing of the exchange.*

If the remedy given under the rules professed in terms to be exclusive it could only be so construed in view of the further rule requiring the exchange to be open for the transaction of business on every business day.

Article 1, Section 1, of the By-Laws, entitled "Hours of Business," is as follows: Tr. p. 123.

"The exchange shall be open for the transaction of business upon every business day from 10 A. M. until 2 o'clock P. M."

It will be observed that the rules and by-laws contemplate the exchange as a going concern and the remedy provided by the rules was, of course, predicated upon this fact. In other words, the contention of Jamieson & Company is that a part of the contract which they entered into was a contract to *arbitrate* differences instead of resorting to a court. The arbitrators were to be the designated officers of the Stock Exchange. The articles of convention under which they were to proceed were the articles and by-laws of the association. But on the 31st day of August the Chicago Stock Exchange was closed and no definite time had been set for its re-opening. *It had incapacitated itself and its officers from fulfilling the duties of umpire and arbitrator.* This incapacity, according to all analogy, would release a party from his agreement to arbitrate, even assuming such an agreement to have been made. *It is in strict analogy to the death of an arbitrator or his refusal to act.*

See *Morse, Arbitration and Award*, pp. 229, 234, 236.

III.

THE PRICE BID FOR 700 SHARES OF DIAMOND MATCH STOCK AT THE PUBLIC SALE CONDUCTED AT THE INSTANCE OF PETITIONERS, RAISED A PRIMA FACIE PRESUMPTION OF VALUE WHICH, IN THE ABSENCE OF CONTROVERTING EVIDENCE, BECOMES CONCLUSIVE. PARTICULARLY IS THIS TRUE WHEN THE METHOD OF ESTABLISHING VALUE, URGED BY RESPONDENTS AS THE EXCLUSIVE METHOD, WOULD HAVE RESULTED IN GREATER LOSS TO THE RESPONDENTS.

The contention of Jamieson & Company is that the sale conducted by the representatives of Clews & Company was a *nullity*, for the reason that it was simply going through the form of selling 700 shares of stock *belonging to Schwartz*,

Dupee & Co. to Henry Clews & Company, thence to be returned to the possession of Schwartz, Dupee & Company, without the actual payment of money; that it was a juggling and shuffling of securities without significance, and if not a fraud in fact, was at least a fraud in law.

We have stated the proposition as brusquely we think as it is possible for the respondents to do, and will proceed to analyze it.

Undoubtedly, at the time of the tender of 1,150 shares of stock by Schwartz, Dupee & Company to Jamieson & Company, and for some time prior to such tender, the particular shares of stock *were* the property of Schwartz, Dupee & Company. It is also true that these shares, or at least 700 of them, were furnished or loaned to the petitioners, Henry Clews & Company, for the purposes of the tender and the subsequent sale, with the understanding that in the event such shares were accepted by Jamieson & Company, or were actually parted with at the sale, the petitioners should return to Schwartz, Dupee & Company a like number of shares of the same stock. Whether Clews & Company owned at the time, or had under their control in New York, these shares, or whether they expected to procure the same in the open market, does not appear from the testimony, nor can we conceive the fact to be material. For if Jamieson & Company really desired the shares they had an opportunity to acquire them when they were tendered, or of outbidding Clews & Company for them at the public sale. *The source of supply was no sort of concern to Jamieson & Company.* Whether Clews & Company would make good the loan was a risk assumed by Schwartz, Dupee & Company and personal to them. The loan of stock by a broker to his principal is in the strictest sense a *mutuum*, and is an every-day occurrence. Indeed, very respectable authorities have held

that one of the implied undertakings of a stock broker selling for a customer for the account is to furnish the stock.

See

Knowlton v. *Fitch*, 52 N. Y. 288.
White v. *Smith et al.*, 54 N. Y. 522.

In *Fisher* v. *Newark City Ice Co.*, 62 Fed. Rep. 569, a contract provided that plaintiff should cut, house and deliver on board defendant's vessels fifteen thousand tons of ice. Plaintiff tendered four thousand tons, which were refused, whereupon plaintiff abrogated the entire contract and sued for damages. The ice tendered by plaintiff was proved to have been the property of another with whom plaintiff had a contract. Concerning this fact the district judge observed, p. 573:

"It appears, however, that he (plaintiff) had four thousand tons on hand. *It is immaterial that another was interested in this. He had entire control of it.* The refusal to take it excused him from making further provisions to deliver."

In the Circuit Court of Appeals in the same case (there entitled *Newark City Ice Co.* v. *Fisher*), 76 Fed. Rep. 427, the ruling of the lower court was affirmed, the court remarking concerning the point above mentioned:

"Whether he (plaintiff) had it (the ice) in actual possession *or under control by contract with others is unimportant. In the latter contingency the nature of the contract does not concern the defendant.*"

But the loan of the stock by Schwartz, Dupee & Company to Clews & Company had this element which inured to the advantage of Jamieson & Company; under the terms of the loan the petitioners were required at a public sale fairly conducted, *to bid more than any other person would be willing to bid if the same shares were to be returned;* or the full market value of the stock *if like stock was to be substituted.*

No charge of actual fraud or unfairness is made or even hinted at by counsel for respondents; and all that was done by the petitioners and their representatives in, about or concerning the sale, appears in the testimony, and for the most part is documentary.

But even if the petitioners and their representatives had prevented fair and open bidding, the circumstance would not destroy the *fact* of sale nor the *prima facie* evidence of market value established by it, though it might be that very little controverting evidence would be required to overcome the *prima facie* presumption. To illustrate: If respondents had introduced testimony showing that the public sale of the stock in question had been unfairly conducted, and that the price realized, to-wit, $130 per share, did not represent free and untrammeled public bidding; and had further introduced testimony to the effect that $135 or $155 per share would be the fair market value of the stock, the latter testimony, we are frank to say would, under such circumstances, be altogether more credible; and so, doubtless, the master would have considered it. But there is not a syllable of testimony in the record impeaching the fairness of the sale or otherwise attempting to establish the value of the stock, unless it be the prices current on the Chicago Stock Exchange after its opening, November 5th. These prices so far from impugning the price realized at the sale, only confirm it.

The contention of Jamieson & Company, therefore, is narrowed to the strict legal questions: Was the sale one which the law recognizes as such? Did it establish a *prima facie* market value?

We have said that at the time of tender and prior thereto, the stock tendered was the property of Schwartz, Dupee & Company; but we further say that instantly such stock was

segregated and appropriated for the purposes of the tender, and actually tendered, *it became the property of Jamieson & Company.*

We will formulate the proposition as follows:

When Schwartz, Dupee & Company selected the particular certificates for 1,150 shares of stock, and appropriated them to the contract with Jamieson & Company, such stock became the property of Jamieson & Company, subject to the right of Schwartz, Dupee & Company;

1. *To rescind the sale, if they so elected, upon breach of the contract by Jamieson & Company.*

2. *To retain possession under a vendor's lien until paid the purchase price.*

In considering when the title passes on a sale of personal property care should be taken to distinguish those cases which are decided under the English Statute of Frauds and similar statutes in the United States.

Under the seventeenth section of the Statute of Frauds, title would not pass where there was no memorandum in writing, and no part of the price paid, until the goods or a part of them had been actually delivered *and accepted.* But that section is not in force in Illinois, and acceptance by the vendee is not a prerequisite in this State even when the contract is not in writing.

In the case at bar the contract was not for any specific shares of stock. They were unidentified. The sale was for 1,150 shares out of the total of the capital stock of the Diamond Match Company. Before title could pass the property must be specified, but when property is selected and appropriated to the contract, the contract then relates to that specific property and becomes a contract of sale for the identical shares so appropriated.

See the very instructive discussion of this question *Book II, Chapter 5 of Benjamin on Sales.*

The right of Schwartz, Dupee & Company to make the selection can not be questioned. They were bound to deliver; being bound to deliver they were bound to make the selection. From the nature of the transaction the right to make the selection could not rest in Jamieson & Company. If it did they might compel Schwartz, Dupee & Company to deliver any particular shares no matter by whom they were owned. This, of course, would be absurd. Necessarily the right to select the particular certificates must have rested in Schwartz, Dupee & Company.

See the following Illinois cases, as to when the title passes:

Rhea v. *Riner*, 21 Ill. 526.
Wade v. *Moffett et al.*, 21 Ill. 110.
Seckel v. *Scott*, 66 Ill. 106.
Barrow v. *Window*, 71 Ill. 214.
Owens v. *Weedman*, 82 Ill. 409.

Schwartz, Dupee & Company did not elect to rescind the sale. This is shown by every act of theirs and of petitioners. When the stock was resold at auction Jamieson & Company were notified that it would be resold for their account. If the sale had been rescinded there would have been no right to make such a sale. Jamieson & Company were further notified that in the meantime Clews & Company held the stock ready for delivery on payment of the purchase price.

That a resale is not a rescission, see:

Bayley v. *Findlay*, 82 Ill. 524.
Ullman v. *Kent*, 60 Ill. 271.
Saladin v. *Mitchell*, 45 Ill. 84.

Benjamin on Sales, Sec. 794.

Hayes v. *City of Nashville*, 80 Fed. Rep. 641.

Upon failure of Jamieson & Company to pay for the stock, the remedies of Schwartz, Dupee & Company were:

1. *To retain the stock as their own property and sue for damages. This would involve, as a matter of course, the rescission of the sale.*

2. *To store or safely keep the stock and sue for the full purchase price as an indebtedness owing by Jamieson & Company. This remedy would of course be based upon the contract as an existing obligation and would involve the retention of the stock for delivery upon demand.*

3. *Treating the contract as still in force and unrescinded, fully performed on their part, and with the obligation still existing on the part of Jamieson & Company to pay the full purchase price, Schwartz, Dupee & Company might sell the stock on account of Jamieson & Company,* TREATING IT AS THE PROPERTY OF JAMIESON & COMPANY, *such resale being authorized under an implied authority from Jamieson & Company; and the duty of Schwartz, Dupee & Company would be to make a fair sale and account to Jamieson & Company for the proceeds. They would have a right to appropriate a sufficient amount of the proceeds to pay the indebtedness of Jamieson & Company, but would be bound to account to Jamieson & Company for any overplus. If there should be a deficiency, it would be a deficiency on the original indebtedness, i. e., a balance due.*

The third course was the one pursued. The right of resale is universally recognized in the courts of England and America. In some decisions it is said the vendor acts as pledgee in making a resale; in others that he acts as agent of the vendee. Perhaps neither expression is exactly accurate, but either one for most purposes expresses nearly

25201

enough the relations of the parties. In any case the right must proceed on the theory that the property is the property of the *vendee;* that the vendor has authority from the vendee to sell it; that the vendor has a lien on the goods; that by virtue of his lien and the implied authority to sell he has a right to apply the proceeds to the payment of the indebtedness owing by the vendee; that in the meantime the vendee has a right to redeem the property, and until it is sold under the implied authority the vendor should preserve the property ready to be delivered.

In the event of sale, all that is required of the vendor is that the sale should be fair, and calculated to bring the fair market value.

Ullman v. *Kent*, 60 Ill. 271.

Now, in pursuing their remedy by resale, Schwartz, Dupee & Company were not bound to sell in their own names nor to advertise themselves, nor the persons employed by them, as acting for Jamieson & Company. They might have placed the stock in the hands of any broker to dispose of to the best advantage, and such broker would not be bound to disclose for whom he was acting.

Morris v. *Wibaux*, 159 Ill. 646.

As a matter of fact, Schwartz, Dupee & Company placed the stock in the hands of the petitioners to sell, who were even more interested than themselves in seeing that the stock should not be disposed of at a sacrifice. Schwartz, Dupee & Company, having originally furnished the stock for the benefit of the petitioners, had a right to look to petitioners to protect them from loss—to supply other stock in the place of that loaned.

Permit us to sum up the situation at the date of the sale. The property in the stock passed to Jamieson & Company on

August 31st. It still remained in them on September 22d. Schwartz, Dupee & Company had a right to retain it under their vendor's lien as against Jamieson & Company. It had been furnished by Schwartz, Dupee & Company for the benefit of the petitioners on August 31st, and they might then have called upon petitioners to furnish other like stock. At the sale the stock was produced by Schwartz, Dupee & Company for the purposes of the sale. It is not pretended that the stock would not then and there have been delivered to any purchaser, nor can it be assumed that Schwartz, Dupee & Company or Clews & Company, were not entirely responsible, or that they would not have been bound to the highest bidder to deliver the stock. Clews & Company were the highest bidders. They, by their agent employed by them, offered to give $130 per share for the stock, and it was declared also by their agent to be sold to the bidder employed by them. Let it be conceded that in making the sale they were agents, or sub-agents or pledgees of Jamieson & Company; that they made the sale to themselves through other agents employed by them. The stock was delivered by Schwartz, Dupee & Company to Clews & Company as agents.

Now let us suppose, after all this had been done, Clews & Company and Schwartz, Dupee & Company, ignoring the transaction, had, one or the other of them, commenced an action against Jamieson & Company for the full amount of the latter's indebtedness and had tendered such stock in court. Jamieson & Company unquestionably would have the right to show this transaction as amounting to a payment, as a credit upon the indebtedness to the full amount bid by Clews & Company. In other words, if Jamieson & Company found that the result was to their advantage they could hold Clews & Company to it.

25202

See, as a case very similar in principle *Fidelity Co.* v. *Roanoke Iron Co.*, 81 Fed. Rep. 449.

But it is not necessary for us to establish that this sale was absolutely binding upon Jamieson & Company, because the utmost they can claim is that it was *voidable*.

Mulvey v. *Gibbons*, 87 Ill. 367.

Gibbons v. *Hoag*, 95 Ill. 45.

Jenkins v. *Pierce*, 98 Ill. 646.

Cases are not infrequent where agents, trustees, pledgees or mortgagees bid in property sold under a power resting in themselves. It has never been held that such sales are *void*. All that can be claimed is, that if the principal chooses to avoid the sale on the ground that the agent was not authorized to purchase, he may do so, and the parties are then placed in *statu quo*. If the property were sold under a lien the lien revives. If at the time of the sale a credit was given for the amount bid, that credit, of course, is extinguished when the sale is avoided.

It is obvious that a sale can be ratified by the principal, and the cases are numerous which declare that where the person making the sale acts under a power coupled with an interest, it is the duty of the owner to repudiate the transaction promptly and seasonably, and if he fails to do so he will be held to have ratified the sale.

In the case of *Cunningham* v. *Macon & Brunswick R. R.*, 156 U. S. 400, the State of Georgia, as a trustee and indorser of railroad bonds, became the purchaser of the property at a sale made by it under a power of sale given in the mortgage. Junior incumbrancers claimed that the sale was void, and that the State, as trustee, could not purchase at its own sale. After premising that in Georgia the purchase by a trustee is not absolutely void, but merely voidable at the option of the *cestui que trust*, the court say, p. 424:

"Under these circumstances, conceding that the second series of bonds were secured by a second mortgage, their holders can not equitably be allowed to avoid the sale *without tendering reimbursement of the amount of the first mortgage* (etc.). * * * Instead of doing this, although nearly two years had elapsed between the sale and the filing of this bill, the complainants assert that their bonds are, in the contingency last stated, equal in rank of mortgage lien with those of the holders of the first series, and hence that they are entitled to an equal participation in the proceeds of the mortgaged property. * * * No offer to pay the amount of the first mortgage was made prior to the purchase of the property by the defendants, and their title can not be divested, even if such an offer were made."

In the case of *Collins* v. *Riggs*, 14 Wall. 491, a mortgagor attempted to treat a sale as voidable and offered to redeem by paying the amount *bid*. The syllabus clearly and accurately expresses the decision, and is as follows:

"To redeem property which has been sold under a mortgage (as is alleged irregularly) it is not sufficient to tender the amount of the sale. *The whole mortgage money must be tendered*, or if suit be brought, be paid into court."

In the case of *Strauss* v. *Labsap*, 59 Mo. App. 260, the question arises in a case similar to the case at bar. The action was to recover the balance of the purchase price as an existing indebtedness; that is, the difference between the contract price and the net amount realized upon a resale, at which resale the plaintiff purchased a portion of the goods. There being no evidence of the value of the goods other than that afforded by the resale it was urged that the plaintiff could recover only nominal damages.

While the Missouri Court of Appeals is not a court of last

resort it is a court of respectable authority, and the good sense of the decision is so apparent that we venture to quote from it.

"The argument in support of this assumes that the purchase by the plaintiffs is absolutely void. This is the vice in the argument, for the purchase is only voidable, and could only be avoided by the defendant on terms." * * *

"Now, it is true that the plaintiffs in conducting a resale acted as trustees or agents for the defendant, but their agency was coupled with an interest. *If they deemed it necessary to protect their interest they could buy the goods, but they held them subject to redemption, provided the defendant acted seasonably.* Upon being apprised of the purchase, it was the right of the defendant to have the goods purchased by the plaintiffs returned to him upon tender of the contract price, less the amount realized from a portion of the goods sold to third parties, or if the return of the goods was impossible, then, upon offer to pay the balance of the original purchase price, he would have been entitled to a credit for the actual market value of the goods purchased by plaintiffs, regardless of what they brought at the resale. This would be the rule if the defendants and the plaintiffs occupied the position of mortgagor and mortgagee and the suit was to recover the balance of the mortgage debt, and we see no reason why, in the adjustment of equities between these parties, the same rule would not prevail." * * * "The evidence of the plaintiffs tended to show that the sale was fairly conducted. The defendant offers no counter evidence and he did not offer to redeem although he was fully advised, prior to the trial, that the plaintiffs had purchased a portion of the goods."

The answer of Jamieson & Company, with reference to the auction sale, in substance, only states that there was

no sale as a matter of fact. It alleges that the petitioners borrowed from Schwartz, Dupee & Company, or some one else, certain certificates; that the petitioners employed some one to bid in their behalf; that no delivery of the stock to such person was made, and no money was paid by him. There is no allegation that respondents have repudiated or desire to repudiate the sale, or desire to redeem the property in the hands of the petitioners or of Schwartz, Dupee & Company. There is no allegation that respondents have ever been willing or have offered to perform their contract.

Their unwillingness to repudiate is easily accounted for. In the first place they would be obliged to offer to comply with their contract, and to pay the full purchase price; or they would assume the burden of showing that the price bid was less than its market value; or as a last resort they would be obliged to accept the price current on November 5th, as the value of the stock. So that it is apparent whichever position they should assume on repudiating the sale, would be worse than the position they now occupy.

The answer does challenge the fairness of the sale in one particular. It alleges that there was a *bona fide* bidder who offered $135 per share for 500 shares, but that appellants refused to accept this bid. The testimony shows that the whole of the 700 shares were offered in a lump. Nothing is shown to indicate that this was improper. There was a bid by the president of the Diamond Match Company, not for 500 shares, as alleged in the answer, but for 200 shares at $135 per share. This bid was not absolutely refused, but it was stated that if there were other bids for the rest of the stock in an amount sufficient, together with the bid for 200 shares, to exceed the bid which had then been made for all of the stock, such bids would be received, and an opportunity

was given for other bids to come in for the remainder of the stock.

Some point was made by counsel for Jamieson & Company that the stock was returned to Schwartz, Dupee & Company; that the petitioners paid no money to Schwartz, Dupee & Company. This payment of money would indeed have been an idle ceremony. If the petitioners had paid the money to Schwartz, Dupee & Company, they would have been bound immediately to repay the same to the petitioners. If petitioners had retained this identical stock they would have been bound to substitute other like stock to Schwartz, Dupee & Company. It really is no concern of the respondents that these reciprocal obligations were satisfied between petitioners and Schwartz, Dupee & Company by the return of the identical stock and the omission to exchange checks.

See *Wald* v. *Rees*, 48 Ill. 428.
Jacobs v. *Turpin*, 83 Ill. 424.

IV.

THIS SUIT WAS PROPERLY BROUGHT, AND PETITIONERS CAN HAVE ADEQUATE RELIEF ONLY IN A COURT OF EQUITY, AND FOR THE FOLLOWING REASONS:

1. BECAUSE THE FUND IN THE POSSESSION OF THE MANAGERS OF THE STOCK EXCHANGE IS A TRUST FUND, WHICH EQUITY IS ASKED TO ADMINISTER.

2. BECAUSE IT IS DOUBTFUL IF AN ACTION AT LAW WOULD LIE IN THE NAME OF THE PETITIONERS AGAINST THE STOCK EXCHANGE.

3. BECAUSE IF THE PETITIONERS COULD SUE THE STOCK EXCHANGE AT LAW, THE REMEDY WOULD NOT BE AS COMPLETE NOR AS EFFECTUAL AS THE RELIEF IN EQUITY.

4. BECAUSE THE CONTRACT OF JAMIESON & COMPANY WAS

A SINGLE CONTRACT FOR THE PURCHASE FROM SCHWARTZ, DUPEE & COMPANY OF 1150 SHARES IN WHICH THE PETITIONERS WERE INTERESTED ONLY TO THE EXTENT OF 700 SHARES.

1. *The deposit in trust.*

In argument upon the demurrer it was contended by counsel for respondents that the managers of the stock exchange were simply stakeholders, and that petitioners were attempting to garnish the stock exchange by a bill in equity. The analogy to garnishment is not even close enough to be specious. The mere fact of garnishment is an acknowledgment that there is no privity between the plaintiff and the garnishee, nor any right to, or lien upon particular property in the garnishee's possession. The very object of a garnishment is to acquire a lien by operation of law. Here the petitioners assert a lien on a particular fund, and in effect are seeking to foreclose it. The managers of the stock exchange were, in a conventional sense, stakeholders, but we think on final analysis it will be found that nearly every trustee of money, where there are two or more *cestuis que trust*, will be found to be a mere stakeholder.

The deposit of money by Schwartz, Dupee & Company and Jamieson & Company with the stock exchange created a trust simply because it *was* a deposit—a *depositum*—a bailment.

"Bailment, from the French *bailler*, to deliver, is a *delivery of goods in trust* upon a contract, expressed or implied, that the trust shall be faithfully executed on the part of the bailee." 2 Black. Com. 452.

The definition of Sir William Jones is to like effect.

See

Jones on Bailments, 117.

See also

Story on Bailments, Ch. 1 Par. 2.

25205

A deposit, or *depositum*, is defined by Judge Story as

"A bailment of goods to be kept by the bailee *without reward*, and delivered according to the object or purpose *of the original trust*."

One of the definitions of Rapalje is:

"Money lodged with a person as an earnest or security for the performance of some contract."

See

Law Dictionary, tit. "Deposit."

If a depositary of a chattel repudiates the trust and converts the chattel to his own use, or disposes of it, the claimant has choice of a variety of remedies. He is not bound to proceed in equity under the original contract of bailment, because the depositary himself has, by his acts, repudiated the contract. If the specific chattel is still in the possession of the bailee, the bailor may replevy it. If the bailee has destroyed or disposed of the chattel he is guilty of a tort, and like every tort-feasor, may be compelled to respond in damages; or, by a fiction of law, the claimant may count upon an implied contract and sue in assumpsit. In other words, the claimant may repudiate the original contract and the original relationship and assume the relationship of creditor and debtor, and is entitled to all legal remedies incident thereto. But is he *compelled* to abandon the original contract of bailment and assume the attitude of a simple creditor? Would it not be an anomaly to declare that because one party to a contract has repudiated the contract, therefore all parties must be presumed to have repudiated it? Can the wrongful act of a bailee transmute him into a simple debtor, notwithstanding the bailor prefers still to regard him in the former relationship? It seems to us that the very statement of the proposition contains its own refutation.

See

Goodenow v. *Snyder*, 3 G. Green, Ia. 599.
Coster v. *Murray*, 5 Johns. Ch. 532.
Kane v. *Bloodgood*, 7 Johns. Ch. 90.
McCrea v. *Purmort*, 16 Wend. 460.

The doctrine announced in the foregoing cases is not obsolete, for as recently as May, 1891, was decided the case of *Gutch* v. *Fosdick*, by one of the most respectable of our State courts (48 N. J. Eq. 353). It is not necessary for us to declare our concurrence in all the views of the court, for, to speak frankly, it seems to us that where money is deposited as a bailment, if subsequently, by agreement of the parties, the bailee is to pay interest thereon, the relationship is changed to creditor and debtor, and the reasoning of the chancellor in *Gutch* v. *Fosdick*, to take the transaction out of this category, strikes us as somewhat refined.

In *Levi* v. *Evans*, 6 C. C. A. 500 (a case determined in this circuit), the principle is announced that to establish and enforce an alleged trust, and to secure an accounting for a breach thereof, is a familiar subject of equitable jurisdiction. And further, that a trust in respect to money or other personal property may arise or be created upon the same facts and circumstances which would give rise to a trust in real estate, except that in respect to the latter the trust must be manifested by writing.

See also

McCampbell v. *Brown*, 48 Fed. Rep. 795.
National Park Bank v. *Halle*, 30 Ill. App. 17.
Warner v. *Martin*, 11 How. (U. S.), 209.

The rule is stated by Mr. Pomeroy in his work on Equity Jurisprudence, section 158, as follows:

"A court of equity will always by its decree declare the

25206

rights, interests, or estate of a *cestui que trust*, and will compel the trustee to do all the specific acts required of him by the terms of the trust. It often happens that the final relief to be obtained by the *cestui que trust* consists in the recovery of money. This remedy the courts of equity will always decree when necessary, whether it is confined to the payment of a single specific sum, or involves an accounting by the trustee for all that he has done in pursuance of the trust, and a distribution of the trust moneys among all the beneficiaries who are entitled to share therein."

The moneys deposited by Schwartz, Dupee & Company and Jamieson & Company with the managers of the stock exchange were to secure the mutual performance of their contract as set forth in the bill, with the understanding and agreement that said stock exchange was to account and pay over to the party entitled to it so much of said fund as might appear to be their due when the contract should have been executed.

It seems to us clear that thereupon said stock exchange became a trustee, and that the funds so deposited were trust funds, and that the claimant of said funds would have the right to sue said stock exchange for a breach of trust in equity if it failed or refused to account for such funds, even conceding that such claimant might have his remedy at law for money had and received.

It goes without saying that the stock exchange, if so disposed, could have brought its original bill of interpleader against Henry Clews & Company and Jamieson & Company, setting forth that it disclaimed any interest in the fund; that the parties defendant were claimants thereto, and compel the said parties to litigate their right to the fund in a court of equity, *whether their claims were legal or equitable.*

See

Bailey v. *Insurance Co.*, 114 Mass. 177.

2. *Could petitioners sue at law to recover the funds in the hands of the stock exchange?*

The contract of sale was between Schwartz, Dupee & Company and Jamieson & Company, and the trust fund was deposited by them. The undertaking of the stock exchange was with the above named parties. The doctrine that an undisclosed principal is bound by the acts of his agent would hardly apply to the stock exchange, which was acting, not as an agent of either party, but as a trustee for both.

The case of *National Bank* v. *Insurance Company*, 104 U. S. 54, is in point and the analogy is complete. In that case Dillon, the agent of the insurance company, deposited its money in the bank, and the bank had notice that the money was the money of the company.

It was objected that the remedy of the company to recover the fund was at law and not in equity. The court, however, says:

"But the contract created by the dealings in a bank account is between the depositor and the bank alone, without reference to the beneficial ownership of the moneys deposited. No one can sue at law for a breach of that contract except the parties to it. There was no privity created by it * * * between the bank and the insurance company. * * * No action at law upon the account could be maintained by the insurance company."

Certainly, if the insurance company could not sue the bank at law to recover money received by the bank with knowledge of its ownership, how can Clews & Company sue the stock exchange at law? The stock exchange did not even

know that any one but the depositors had any interest in the fund.

The case is also valuable as an authority for the point that the money in the hands of Dillon was impressed with a trust in favor of the insurance company, which would give a court of equity jurisdiction on that ground, if no other, and the court cites approvingly the case of *Dillon* v. *Ins. Co.*, 44 Md. 386, to this very point.

National Bank v. *Insurance Company* is likewise pertinent to a point already discussed. The trial judge, in the case at bar, by no means determining that, in conscience, the petitioners were not entitled to recover, dismissed their bill for want of privity—the very reason given by the Supreme Court why equity should take jurisdiction.

3. *The legal remedy, if existing, would be neither complete nor as effectual as the relief in equity.*

A judgment at law against the stock exchange would still leave the contest, as to the right to the fund, open for future litigation between petitioners and Jamieson & Company, or between petitioners and Schwartz, Dupee & Company.

In *Boyce's Ex'rs* v. *Grundy*, 3 Peters, 215, it is said:

"It is not enough that there is a remedy at law; it must be plain and adequate; or, in other words, *as practical and as efficient* to the ends of justice in its prompt administration as the remedy in equity."

In *Oelrichs* v. *Spain*, 15 Wall. 211, it is said:

"The direct proceeding in equity will save time, expense and a multiplicity of suits, and settle finally the rights of all concerned in one litigation. Besides there is an element of trust in the case which, wherever it exists, always confers jurisdiction in equity."

The answer of the managers of the stock exchange admits that the money deposited with it is held in trust as

security for the performance of the obligations of the parties to the contract of August 3d. The stock exchange has no right to appropriate the money to any other purpose. It can not use it as its own; it can not even return it to the parties without determining which of them, under the terms of the contract, is entitled to it.

4. *Severance of entire contract.*

Leaving out of view, however, the question of trust, how could petitioners have brought an action at law against Jamieson & Company? The contract, as made by Jamieson & Company, was a single contract for the purchase of 1,150 shares. If petitioners had attempted to split up that contract, Jamieson & Company would have objected that they were being subjected to several suits, whereas their liability ought to be determined in a single action. If petitioners had attempted to sue in the name of Schwartz, Dupee & Company, either they or Jamieson & Company might object that the petitioners had no right to use the name of Schwartz, Dupee & Company in a suit upon a contract in which the petitioners had only a partial interest. The case would be strictly analogous to that of an assignment of part of a cause of action, in which the assignor is treated as a trustee. In such cases there can be no remedy at law.

Phillips v. *Edsall*, 127 Ill. 535.

Chapman v. *Shattuck*, 3 Gilman (Ill.), 49.

Of course, if equity assumes jurisdiction for the purpose of administering the trust, or for any other purpose, it will retain it for all purposes.

II.

THE QUESTION OF GAMBLING.

The respondents in their answer did not seek to impeach the contract of August 3rd on the ground that it was wagering or gambling; no testimony was introduced before the master remotely touching such an issue; and it was only in response to the innuendoes of counsel in oral argument that the master found affirmatively that the transaction was not gambling. This finding of the master was, in effect, affirmed by the trial court when his honor, Judge Grosscup, speaking of the contract here sued upon, declared:

"*There can be no question* that there came into existence by the transaction stated a contract, whereby, primarily between Schwartz, Dupee & Company and the defendants, the latter were *obliged* to purchase of the former, and the former were *obliged* to sell to the latter, during the month, 700 shares of this stock at the price of $222 per share."

Whether the transaction *on its face* disclosed an intention of the parties *necessarily* unlawful, and rendering the contract between them gambling *per se*—this question, perhaps, was still in the case, and the court of appeals, therefore, would, of its own motion, be justified in taking judicial notice of it.

We have seen that a sale for future delivery on the Chicago Stock Exchange must, under the rules of that institution, go through the clearing house. We have seen that the transaction out of which this controversy arose proceeded step by step through the usual and ordinary routine, resulting in the contract of August 3rd, upon which this suit was brought. *There is not a circumstance in the transaction out of the ordinary, save only as the methods peculiar to the Chicago Stock Exchange have made it so.* Nevertheless, the

Circuit Court of Appeals has declared the transaction to be a gambling transaction. The decision of the Court of Appeals is the most far-reaching on this important subject in the whole body of the law. *Its effect is to make every one, availing himself of the machinery of a stock exchange to effect sales for future delivery, a gambler in spite of himself and regardless of his intentions.*

That a stock exchange offers unusual facilities for *speculation* in shares of corporate stocks may be admitted. But the law does not prohibit speculation, however much individual judges may reprobate it. A man has as much right to exercise his judgment as to the future values of corporate stocks and trade in them accordingly, as the merchant has to order his winter stock of dry goods in the middle of July, or a contractor to agree with the government to supply beef for the Indians, himself not owning a neat's foot. Sporadic legislation against contracts of sale for future delivery has, on trial, proved more harmful than healthful, and in every instance, so far as we are aware, has been repealed.

In common parlance, the man who agrees to buy shares of stock as an investment, to put away in his strong box to await the development of the enterprise represented by them, is a conservative business man, particularly if, *in the long run*, his judgment is vindicated; while the man who agrees to buy and sell, hoping to realize a small profit on the turn of the market—even before he is called upon to perform, perhaps—is a gambler. The law makes no such distinction. It does not predicate a principle on the mere lapse of time. Both are speculators, neither is a gambler. Indeed, there is more logic than casuistry in the argument which reduces all enterprise to speculation and, as it were, to gambling; and the common law, as we know,

25203

upheld wagers. But there is an ethical as well as legal distinction between lawful and unlawful speculation—between business and gambling. In case of a wager as to whether a thing will or will not happen, the loser has nothing whatever to show for his loss; whereas the man who has agreed to buy a thing at a future time at a price greater, as the event shows, than he could then purchase it, obtains the thing contracted for; and the man who agrees to sell a thing at a future time for less than he might then obtain in the market, receives the price he bargained for.

As said by ANGEW, J., in *Kirkpatrick* v. *Bonsall*, 72 Pa. St. 158:

"We must not confound gambling, whether it be in corporation stocks or merchandise, with what is commonly termed speculation. Merchants speculate upon the future prices of that in which they deal, and buy and sell accordingly. In other words they think of and weigh, that is, speculate upon, the probabilities of the coming market, and act upon this lookout into the future, in their business transactions; and in this they often exhibit high mental grasp, and great knowledge of business, and of the affairs of the world. Their speculations display talent and forecast, but they act upon their conclusions and buy or sell in a *bona fide* way. Such speculation can not be denounced. * * * *The illegal purpose is therefore a fact falling within the province of the jury*, and when found by them, brings the contract under the ban of the law."

And the language of THOMPSON, C. J., in *Smith* v. *Bouvier*, 70 Pa. St., p. 232, is equally to the point:

"*Bona fide* time contracts about stocks and other personal property seem from custom to be necessary in our country, and although such transaction may be greatly affected by the rise and fall of the market, yet they are not for this rea-

son obnoxious to the objections made to the transactions we are now considering; for in such case the losing party has something for his money, but the losing gambler nothing.

"The doctrine contended for here would place all stock contracts on the same footing, if making profits may be deduced as the motive of the parties buying and selling. When stocks are bought and sold, to be actually delivered, it is a very different case from that of Brua's appeal, *supra*, where the transaction was found to have been simply a bet or wager. In the one case the transaction is within the scope of a business everywhere recognized as legitimate; in the other it is a gambling transaction, which courts will never exert their power to enforce, if not entirely executed by the parties."

In *Porter* v. *Viets*, Fed. Cas., 11,291 (Illinois, U. S. Circuit Ct.), Judge DRUMMOND went far in excluding evidence of a collateral understanding, but his definition of a wagering contract is clear and forcible.

V. sold corn to P. at forty-eight cents, for delivery June 30; when that time came, corn had risen to sixty-three cents; V. refused to deliver. Suit brought for non-delivery. V. set up that at time of making contract (April) he had not the corn to deliver, nor had he entered into any contract to purchase it to fulfill his contract with P.; nor had he any expectation of obtaining corn; that it was not intended by parties that corn should be delivered, but that it was a contract for the payment of the difference between price mentioned and its market value at time of delivery; that it was nothing more than a wager between parties as to price of corn at the time fixed on, and that the contract was only a cover to the real intent of the parties, which was merely a bet, and nothing more.

DRUMMOND, J.: "Whatever doubt may have formerly

25210

existed, it must be now considered the settled law, both in England and in this country, that the mere fact that a man *may not have in his possession, and has not attempted to acquire possession of, a particular commodity, which he undertakes to sell, deliverable at a future time, will not render illegal a contract made by him to sell and deliver the article.* He is bound by his contract, nevertheless, and must deliver the property, or be subject to the consequences of a non-delivery. It is an agreement to sell and deliver at a future day, and to release a party from such a contract, because he did not at the time have the property, would interfere too much with commercial contracts. * * * If corn had fallen fifteen cents a bushel, Viets would have insisted on P. & Co. carrying out *their* contract! Both parties entered into it with full knowledge of the risk they ran, and the court will not help one of them because his judgment was unsound, or because something occurred that he did not foresee. * * * It is not necessary to decide in this case whether a wager between these parties as to the price of corn at a particular time was valid or not. The defendant now insists that he did not make such a contract as is presented to the court by the pleadings, but that it was an agreement to pay the difference between the price of corn as stated, and the price at a future day; in other words, he wishes to prove what the law determines is ordinarily the measure of damages for the non-performance of his contract. The rule is well settled that when two men make a contract, and reduce it to writing, and sign it, that is the contract between them. It can not be shown verbally that something different was intended at the time from what appears in the writing. * * * Here no fraud is pretended; the contract is free from doubt or ambiguity. It is to deliver a certain quantity of corn at a certain time for a certain price, all set forth in writing.

The defendant says that he wishes to show that the intention of the parties at the time was to make a wager as to the price of corn during the last half of June, and that the amount of the wager and the party who was to win or lose was to depend upon the market price of corn. *Now it may be true that the result is precisely the same—that is, the one party loses and the other party gains the same amount as in a wager. So it is in any case of this kind when a party does not perform his contract.* But that circumstance does not make the CONTRACT the same. In the case of a wager on the *price*, when a man pays the '*difference*,' he performs his *contract*, but he does not fulfill *this* contract by paying the difference. HE MEETS THE PENALTY THE LAW IMPOSES FOR A BREACH OF IT. Here this defendant wishes to establish orally that another contract was made at the time, not in writing, and which he alleges was illegal, in order to make out the illegality of the written contract. This can not be done. No doubt all contracts which are illegal may be attacked, but no case has been shown which authorizes a party to prove verbally, that another contract (in itself illegal) existed, *and so get rid of a written contract on its face unexceptionable.*"

In *Hentz* v. *Jewell*, 20 Fed. Rep. 593 (Miss.), HILL, J., said: "If, according to the contract between the parties when made, EITHER MAY DEMAND A STRICT COMPLIANCE WHEN THE TIME FOR PERFORMANCE COMES, THEN THE CONTRACT IS VALID, EVEN THOUGH ONE OF THE PARTIES MAY SECRETLY INTEND AT THE TIME NOT TO COMPLY, IF SUCH NON-PERFORMANCE IS NOT AGREED TO BY THE OTHER CONTRACTING PARTY AT THE TIME OF CONTRACT. In other words, to render the contract invalid, there must *at the time of its creation*, be a mutual understanding between the parties that no delivery is to be made, but only the difference in prices paid."

The *syllabi* in *Clarke* v. *Foss et al.*, 5 Fed. Cas. No. 2852

(7 Biss. 540), give a categorical statement of the propositions we contend for.

The *syllabi* with their annotations read as follows:

1. A contract for the delivery at a future time of personal property, *which the seller has not on hand when the contract is made, nor any means of getting it,* is not void for illegality.

2. *The secret intention of one of the contracting parties not to fulfill his contract, uncommunicated to the other, is not enough to make the transaction illegal.*

(Approved in *Ward* v. *Vosburgh*, 31 Fed. 14.)

3. The intent that such a transaction should be a mere betting on the market, without any expectation of actual performance *must be mutual and constitute an integral part of the contract in order to render it invalid.*

(Approved in *Ward* v. *Vosburgh*, 31 Fed. 14.)

4. *If the contracts were valid in their inception* and not tainted with any gambling intent or device, *a subsequent mutual settlement by the parties by payment of differences,* instead of by actual delivery, *can not make them void for illegality.*

(Approved and applied in *Gilbert* v. *Gaugar*, Fed. Cas. No. 5412; *Ward* v. *Vosburgh*, 31 Fed. 15, 16; cited in *Third Nat. Bank* v. *Harrison*, 10 Fed. 250; *Jackson* v. *Foote*, 12 Fed. 41; *Hentz* v. *Jewell*, 20 Fed. 593.)

The case of *Clark* v. *Foss et al.* arose out of contracts made in Illinois and the case was decided according to the law of that State.

One of the leading authorities in the United States is *Sawyer, Wallace & Co.* v. *Taggart*, 77 Ky., p. 727.

The *syllabi* in this case read as follows:

1. CONTRACTS FOR THE SALE OF GOODS TO BE DELIVERED AT A FUTURE DAY ARE NOT INVALIDATED BY THE CIRCUMSTANCE

THAT AT THE TIME OF MAKING THE CONTRACT, THE PURCHASER INTENDS TO RESELL BEFORE THE TIME APPOINTED FOR THE DELIVERY.

2. CONTRACTS FOR FUTURE DELIVERY, ENTERED INTO WITHOUT ANY MUTUAL AGREEMENT, TACIT OR EXPRESS, THAT THEY ARE NOT TO BE PERFORMED BY DELIVERY OF THE GOODS AND PAYMENT OF THE PRICE, ARE VALID, AND NO SUBSEQUENT AGREEMENT TO SETTLE THEM BY THE PAYMENT OF DIFFERENCES CAN RENDER THEM INVALID.

3. THE FACT THAT THE PURCHASER FOR FUTURE DELIVERY INTENDS NOT TO RECEIVE AND PAY FOR THE GOODS, BUT TO RESELL THEM BEFORE THE DATE OF THE DELIVERY, FURNISHES NO GROUND FOR HOLDING THAT IT WAS TACITLY UNDERSTOOD THE CONTRACT WAS NOT TO BE PERFORMED, AND WAS TO BE SETTLED BY THE PAYMENT OF DIFFERENCES.

4. A purchaser of goods for future delivery—through a commission merchant by depositing a margin—who orders a resale before the contract time for delivery, is liable for all losses thereby sustained.

5. A GAMING CONTRACT IS ONE IN WHICH IT IS AGREED OR UNDERSTOOD IN THE BEGINNING THAT THE THING DEALT FOR IS NOT INTENDED TO BE DELIVERED, BUT THAT THE PARTIES ARE TO SETTLE THEIR MUTUAL WAGES ON THE PRICE, BY PAYING THE DIFFERENCE BETWEEN SALES AT DIFFERENT TIMES.

The contract under consideration in the case of *Sawyer, Wallace & Co.* v. *Taggart* was made on the New York Cotton Exchange.

Say the court:

"Sales for future delivery have long been regarded and held to be indispensable in modern commerce, and as long as they continue to be held valid, one who buys for future delivery has as much right to sell as any other person, and there can not, *in the very nature of things, be any valid reason*

why one who buys for future delivery may not resolve, before making the purchase, that he will resell before the day of delivery, and especially when, by the rules of trade and the terms of his contract, the person to whom he sells will be bound to receive the goods from the original seller, and pay him the contract price. * * *

"But if A, desiring to engage in trade, enters into a contract with B for the purchase of an article for future delivery and becomes bound to receive and pay for it, that is a real transaction, and is valid whether made in the country or on 'Change. What difference, then, is made in the nature or character of the transaction if, instead of intending to receive the article himself and pay for it, he intends to resell it, and thereby procure another to receive and pay for it in his stead?

"*The material matter is that the contract shall be such that its performance can be enforced. If, in the case put, A does not, by reselling, procure another to perform the contract for him, he is bound to perform it himself.* * * *

"It is next contended that such understanding (to gamble) is shown by the fact that in the whole course of dealing between Sawyer, Wallace & Co., and Hamiltons, extending over a period of about two years, and amounting in the aggregate to several hundred thousand dollars, no goods were ever actually received by either on account of any of said transactions.

"This argument would have much force but for the fact that all these transactions were had with the same intention to resell and the further fact that sales were actually made in all instances, just as in those we are considering. If one such transaction might be legally had, then many made with the same object in view would be equally lawful. * * *

"BUT COUNSEL CONTEND THAT THE RULES OF THE NEW YORK EXCHANGE ARE SO FRAMED AND THE COURSE OF DEALING THERE IS SUCH THAT DELIVERIES CAN NOT BE ENFORCED, AND THAT THIS PROVES OR TENDS TO PROVE THAT THE PARTIES UNDERSTOOD THESE CONTRACTS WERE NOT TO BE ENFORCED. RULES 4, 6 AND 8 OF THE COTTON EXCHANGE ARE INDICATED AS ESTABLISHING THIS VIEW.

"Rule 4 provides that either party to a contract may close or cancel it upon notice in writing to the opposite party at any time before notice of delivery. But how? The rule goes on to provide that 'the party to whom notice is given has the option either to make settlement (*i e.*, to pay or receive the difference), or to receive a satisfactory contract made equal to that held by him.'

"Upon such notice being given, the party receiving it *is not compelled* to accept settlement by payment of differences. He has, by the express language of the rule, the 'option' to demand another contract equal to that held by him. The only effect of the rule is, that if the party giving the notice can procure a party satisfactory to him to whom notice has been given to take his place and perform the contract, the contract of such person must be accepted in lieu of the original contract. This is but a reasonable regulation which, while it does not deprive the party receiving the notice of the right to demand the thing purchased, or to deliver and receive payment for the thing sold, may be, and doubtless is, of great practical value and importance to trade, and in no way tends to facilitate fictitious trading or gambling on market prices.

"Practically the rule amounts to this, that the party to whom notice is given must pay, or accept payment of the difference or accept a satisfactory person in the room and

stead of the party giving the notice, and discharge him and look to his substitute for performance of the contract.

"Rule 6 relates to margins, and we do not perceive that it has any bearing upon the question in this case.

"Rule 8 relates to settlements when there has been default in delivering or receiving cotton due on a contract. It provides that in such cases the seller making default shall settle at one quarter of a cent per pound above the average quotations for spot cotton of the day of delivery, and that a buyer making default shall settle at the average quotations for spot cotton of the day following, with the addition of one quarter of one cent per pound in favor of the seller; and it also provides that 'no defaulting party can claim settlement under this rule, except upon evidence that the default was unintentional, and not premeditated.'

"Liability for such a penalty for default, and a provision for this summary mode of making settlements in such cases, would seem to be a sufficient and salutary guaranty for the performance of contracts, and instead of affording facilities for, or furnishing evidence of, gambling on the turn of prices, seems well calculated to insure that good faith and promptness so indispensable in commercial transactions.

"*Without noticing other provisions of the rules, it may be remarked that they seem to provide for real and not fictitious trade; that they provide against unreal transactions; and that so large a portion of the real business in the great cities is done on 'Change as to wholly forbid the conclusion that all contracts made on them are unlawful; and unless such conclusions could be reached, the contract involved here must be held to have been valid and lawful.*"

To the same effect is the holding of Judge COOLEY in *Gregory* v. *Wendell*, 40 Mich. 432.

See also, *Hatch* v. *Douglass*, 48 Conn. 116.

The doctrine announced in *Bibb* v. *Allen*, 149 U. S. 481, is in line with the foregoing authorities. The contract involved was also made on the New York Cotton Exchange, the rules and usages of which institution were held to have been incorporated in the contract.

Say the court:

"In entering into their arrangement, it is shown by the correspondence, and by other testimony in the case, that there was no agreement or understanding between the plaintiffs and defendants that the cotton sold for future delivery *was not in fact* to be actually delivered."

After a general statement that an agent can not recover, being *particeps criminis* in an illegal transaction, the court add:

"But the facts of this case do not bring the transactions in question within the operation of that principle, for the evidence set out in the bill of exceptions *fails to show* that either party to the transactions intended the same as wagering or gambling speculations. On the contrary, the undisputed testimony establishes that the sales were not wagers, but that the cotton was to be actually delivered at the time agreed upon. Bibb's own statement of the transactions does not disclose the fact that they were intended, even on his part, as gambling or wagering speculations. He certainly never disclosed to the plaintiffs, as his brokers, either in their correspondence or in their verbal communications, that he did not intend to deliver the cotton sold through them for future delivery. *In addition to this it is shown that the rules and regulations of the New York Cotton Exchange recognized no contracts except for the sale and purchase of cotton to be actually delivered. These rules and regulations impose upon the seller the obligation to deliver the cotton sold, and upon the purchaser the*

obligation to receive it, except in certain specified cases, which have no application to the present case.

"It is well settled that contracts for the future delivery of merchandise or tangible property are not void, whether such property is in existence in the hands of the seller, or to be subsequently acquired. 2 Kent's Com. 468, and authorities cited in notes; Benjamin on Sales, Am. Ed., 81, 82. *It is further well settled that the burden of proof is upon the party who seeks to impeach such transactions by showing affirmatively their illegality. Rountree* v. *Smith*, 108 U. S. 269; *Dykers* v. *Townsend*, 24 N. Y. 57; *Irwin* v. *Williar*, 110 U. S. 499, 507, 508. In this latter case (*Irwin* v. *Williar*) the trial court charged the jury that 'the burden of showing that the parties were carrying on a wagering business, and were not engaged in legitimate trade or speculation, rests upon the defendant. On their face these transactions are legal, *and the law does not, in the absence of proof, presume that the parties are gambling.* A person may make a contract for the sale of personal property for future delivery which he has not got. Merchants and traders often do this. A contract for the sale of personal property which the vendor does not own or possess, but expects to obtain by purchase or otherwise, is binding if an actual transfer of property is contemplated. A transaction which on its face is legitimate can not be held void as a wagering contract by showing that one party only so understood, and meant it to be. *The proof must go further, and show that this understanding was mutual; that both parties so understood the transaction.*'" * * *

And the court adds, p. 493:

"This court approved that charge as a correct statement of the law upon the subject of what constitutes a wagering contract. It is directly in point here, for the evidence *fails to show* not only that Bibb & Company intended it as a wager-

ing contract, but it *fails to show* also that the plaintiffs so understood it. The testimony establishes that the plaintiffs did not, in fact, so understand it.

"It further appears that in the memorandum, or 'slip contracts' of sale actually made by the plaintiffs for the account of Bibb & Company, the sales were described as made 'subject to the rules and regulations of the New York Cotton Exchange.' Under these circumstances we are of the opinion that the testimony *fails to establish* that the contracts in question were wagering transactions, and therefore void. The testimony is so clear to the contrary that the court below, under the settled rules of this court, was certainly justifiable in not submitting that question to the jury; for if it had been submitted, and the jury found that the contracts were wagers, it would have been the duty of the court to set aside their verdict."

The rules of the New York Cotton Exchange are not set out in the opinion in *Bibb* v. *Allen*, but if they may be presumed to be the same as set out in the opinion in *Sawyer, Wallace & Company* v. *Taggart, they permit a greater latitude for settlement according to differences than the rules of the Chicago Stock Exchange.*

A recently hotly contested case through the Illinois courts growing out of a series of transactions on the Chicago Board of Trade, determines many questions involved in this case and incidentally touches upon a rule of the board of trade, which, in its operation, is not unlike the clearing house of the stock exchange.

The case is *Warren & Co.* v. *Scanlon*, to be found in 59 Ill. App. 138, 68 Ill. App. 213 and 169 Ill. 142.

The defendant pleaded the statute against options; also gambling. The verdict of the jury on the first trial was in favor of the defendant and plaintiff appealed. The judgment

of the lower court was reversed because the facts did not justify the inference of the jury that the intention of the parties was to settle according to differences in price.

In the Appellate Court the appellee urged (59 Ill. App. 141) that no delivery of grain was shown except in the "ringing up" process described in *Irwin* v. *Williar*, 110 U. S. 399, and claimed that no rule of the board of trade could bind appellee to accept such delivery unless he had actual, as opposed to presumptive, knowledge of the existence of such a rule.

Further claiming that the rule itself was illegal and void and that "*if business is transacted under it, the board of trade itself is nothing but a gigantic 'bucket shop.'*"

Judge CARTWRIGHT delivered the opinion of the court but did not pass upon this point.

When the case again came before the Appellate Court on an appeal by the defendant (verdict having gone against him), practically the same points were urged, and Judge LACEY, delivering the opinion of the court, says, 68 Ill. App. 217:

"The first instruction ignores the fact (as is claimed) *that the contracts themselves on the board of trade leave an option open to either party to receive or not to receive, to deliver or not to deliver the grain.* We do not understand that the proof tended to show any such option with the board of trade.

According to the rules of the board of trade a purchaser of grain could make sale of as much grain as he had purchased, and the member of the board of trade making the sale or purchase would take the burden upon himself to see that the wheat when delivered on the purchase should be immediately turned over on the sale. He simply took this responsibility as the agent of his employer, his employer not being able to deal on the board of trade himself. *We do*

not think such a rule could be twisted into an optional sale by any fair reasoning. If so, transactions under the rules of the board of trade would be in their nature per se gambling transactions, which we do not understand that any court has ever holden."

The judgment of the trial court being approved, the defendant prosecuted his appeal to the Supreme Court, 169 Ill. 142. Mr. Justice Carter delivering the opinion of the court and re-affirming the judgment.

Tr. p. 149.

Of the opinion of the Circuit Court of Appeals in this case our criticisms are both general and specific.

GENERAL CRITICISMS.

1. The opinion affects to discover from the evidence, combined with the rules of the stock exchange, an *intention* of the parties to gamble. We respectfully insist that the *intention* of the parties in transactions of this kind *is a question of fact*, to be pleaded as a fact, and so found by a jury, or a master, or the trial court.

Bartlett v. *Smith*, 13 F. R. 263.

In an article in the Central Law Journal by Mr. Elliott, of Indianapolis (Vol. 22, p. 271), it is said:

"Intent and motive are two different things, the motive being that which causes or induces the act, and the intent being the purpose for which it is done; but the two words are often used interchangeably in the authorities, and the distinction, while proper, is not always a necessary one. * * * Intention or motive being a state of mind internal and invisible except through outward manifestations, its existence must usually be a matter of inference or presumption from the outward or visible acts and manifestations,

which serve to indicate more or less clearly and conclusively the particular intention. * * * Formerly, therefore, when parties were not competent witnesses, the usual, and in general, the only way of proving intent was by evidence of such conduct, or such outward acts and circumstances as tended directly, or indirectly, to show the particular intent. But where parties are allowed to testify, it is now generally held that the intention is, in a sense, a fact to be proved as any other fact, and that, when material, a party may testify as to his own intention. This seems in accordance with common sense, for no one can tell better what an act was intended to accomplish, or what motive prompted it than the person who did the act. * * *

The inference to be drawn from the acts and circumstances is usually one of fact for the jury to determine; but there are some instances where, as experience has shown, there can be but one reasonable inference, which *of necessity* arises from the facts as they stand otherwise unexplained. *In such cases the law itself fixes and determines the inference, which is called a presumption of law.*"

The learned author then proceeds to give instances of legal presumption, as follows:

"Thus, from the uttering of a forged document, the law presumes an intent to defraud the person who would naturally be affected thereby. So where one sets fire to a building, the presumption is that he intended to destroy it, and also that he intended to injure the owner. So, also, where a baker delivers adulterated bread to a public asylum, the presumption is that he intended it to be eaten. And again, when one man kills another by the voluntary use of a deadly weapon, the law presumes that the killing was intended. In such cases it may be said, *res ipsa in se dolum habet*—the acts are evil and show a wrong intention in

themselves. *But in most cases the intention is not so clearly or conclusively shown that the law itself can draw the inference,* and it is necessary to prove acts and circumstances from which the court or jury may draw the inference as a fact. As said in a recent case (citing *Burke* v. *State*, 71 Ala. 377), *'intention is an inferential fact to be drawn by the jury from proven attendant facts and circumstances.'* "

Says Mr. Wharton, in his work on Evidence, Vol. 1, Sec. 508:

"A witness, also, is not to be permitted to testify as to the motives by which another person is or has been actuated. Motives are eminently inferences from conduct. The facts from which the inferences are to be drawn are to be detailed by the witnesses; *for the jury the work of inference is to be reserved.* Yet where a party is examined as to his own conduct, he may be asked as to his motive, his testimony to such motive being based, *not on inference*, BUT ON CONSCIOUSNESS."

(That direct testimony of intention in this class of cases outweighs mere inferences, see *In re Taylor Estate*, 43 Atl. R. 973.)

The Court of Appeals, notwithstanding no allegation in the pleadings challenged the issue, notwithstanding the parties to the transaction were not interrogated directly as to their intent and motive, notwithstanding their consciences were not "probed" under the sanction of an oath, notwithstanding that *from the nature of the pleadings* no such inquisition could be had, notwithstanding the direct finding of the master (made, not in response to the pleadings or proofs, but to the argument of respondents' counsel), that there was no evidence from which *he* could infer an intention to gamble, notwithstanding that this finding of the master was practically affirmed by the trial court—we say, notwithstanding

all this, the Circuit Court of Appeals, usurping the functions of the master or a jury *inferred from collateral circumstances that there was a mutual understanding and intention from the beginning to gamble*, AND GAVE THIS INFERENCE OF FACT THE SOLEMNITY OF A PRESUMPTION OF LAW.

We respectfully insist that having only appellate jurisdiction, the Circuit Court of Appeals was bound by the findings of the master, concurred in by the trial court, unless some obvious *error* intervened in the application of the *law*, or some serious or important *mistake* in a consideration of the *evidence* had been made; and we cite in support of this postulate:

Crawford v. *Neal*, 144 U. S. 585.
Furrer v. *Ferris*, 145 Id. 132.
Telighman v. *Proctor*, 125 Id. 136.
Kimberly v. *Arms*, 129 Id. 512.

2. Concurring in the language of the opinion that equity looks to the intent rather than the form, and that one who seeks relief must come open-handed, with clean hands, and that a court of equity has the right, and is charged with the duty, to probe the conscience of any litigant, we respectfully insist that to "probe" a conscience *involves an inquiry concerning it;* in the absence of which inquiry the Circuit Court of Appeals was without precedent or authority to ascribe of their own motion an unlawful intent to a party litigant *arising out of circumstances and facts equally consonant with a lawful intent.*

The opinion of the Circuit Court of Appeals seems to us to *assume* an unlawful intention on the part of every one connected with the transaction in all its phases, and to vindicate the assumption by reference to portions of the evidence and rules of the exchange which would not indicate

an intention to the contrary; whereas we respectfully insist that the court *should start with the presumption that the parties did not intend an unlawful act and did not intend to gamble, and that the machinery of the stock exchange clearing house was, like the machinery of every other clearing house, devised and inaugurated for the sole and only purpose of facilitating the transaction of lawful business; which presumptions we insist would have led the honorable court to a very different conclusion.*

3. We have carefully studied all the cases cited by the Circuit Court of Appeals in support of its conclusions and unhesitatingly affirm that not one of the cases cited militates against the doctrine of the cases from which we have been quoting, and that *not one of said cases is applicable to the case at bar*. Except the cases cited in the opinion as to the Illinois statute prohibiting optional contracts—which subject will be presently considered—it may be observed of them:

First. *In every case the defense of gambling was specially pleaded*, alleging a mutual understanding and agreement between the parties to settle according to differences in prices, without delivering the subject-matter of the contract.

Second. That where this issue of fact was thus presented by the pleadings, an assertion on the one side and a denial of gambling on the other, the courts *in every instance* submitted the question to the jury *as a question of fact to be determined by a probing of the consciences of the parties under oath as to their real intention and understanding, and the adduction of testimony as to every conceivable fact from which an intention could be inferred.*

Third. That in several cases the Supreme Court simply affirms the verdict of a jury or the findings of the lower court *without giving any intimation as to the particular facts elicited upon the trial.*

Such are the cases of:

Pickering v. *Cease*, 79 Ill. 328.
Lyon v. *Culbertson*, 83 Ill. 33.
Pearce v. *Foote*, 113 Ill. 228.
Cothran v. *Ellis*, 125 Ill. 496.

Concerning these cases Judge Gary, in *Postal Tel. Co.* v. *Lathrop*, 33 Ill. App. 402, states as follows:

"In the cases in this State, *Pickering* v. *Cease*, 79 Ill. 328; *Lyon* v. *Culbertson*, 83 Ill. 33; *Pearce* v. *Foote*, 113 Ill. 228; *Cothran* v. *Ellis*, 125 Ill. 496, and perhaps some others, the Supreme Court have not settled the facts upon which they animadverted, as they appear in this record."

These cases, of course, can throw no light on the case at bar further than the announcement of the general principle that contracts for future sale in which, according to the understanding and intention of the parties, the goods contracted for are not to be delivered but a settlement is to be made according to differences in price, are gambling contracts, and that gambling contracts are void.

Fourth. That in all other cases cited in the opinion of the Court of Appeals the intention of the parties was found *as a fact:*

1. By the sworn, direct testimony of one of the parties.
2. Corroborated by circumstances.

Fifth. IN EVERY INSTANCE THE INFERENCE DRAWN FROM SUCH CIRCUMSTANCES IS DUE TO THE INCONGRUITY OR INCONSISTENCY BETWEEN THE FACTS PROVEN AND THE INTENTION CLAIMED. They show, for instance:

1. A *series* of transactions beween the same parties covering a period of several months, involving *a large number of sales and purchases, all for future delivery, in which not a single commodity was delivered or tendered.*

2. That the aggregate number of such sales and purchases would foot up an enormous quantity of grain or pork or other commodities, aggregating in value hundreds of thousands, and in one instance cited, millions of dollars.

3. That the parties purporting to purchase or sell such commodities *could have no possible use for them*, inasmuch as they were in *entirely different employment*, being merely *mechanics, doctors, lawyers*, or, if grain dealers, engaged in the actual manufacture of meal and flour, *with a very small capital*.

Sixth. *That the financial status of these parties would not, within the range of sanity, warrant them in actually buying or selling such quantities and in such amounts.*

Seventh. That in every instance where a particular transaction was pronounced by the court to be gambling it was due to a most reasonable inference, *from just such facts as we have enumerated*, UNDER PLEADINGS RAISING THE ISSUE AS A QUESTION OF FACT.

Eighth. That where the facts developed were not so palpably inconsistent with an actual intention to receive or deliver, the juries and the courts have found the transaction to be valid and binding, and in one instance, at least (*Cothran* v. *Ellis*, 125 Ill. 496), the Supreme Court was constrained to affirm a finding in favor of the plaintiff, notwithstanding testimony from which the jury would have been amply justified in finding for the defendant.

And in *Bibb* v. *Allen*, 149 U. S. 481, the Supreme Court of the United States not only justified the lower court in instructing in favor of the plaintiff where the facts were infinitely more dubious than the facts in this case, but went further and declared that if there had been a finding in favor of the defendant the judgment would have been reversed.

Ninth. The authorities all show that the line of demarkation between legitimate speculations, which the law upholds, and gambling in prices, which the law condemns, *depends wholly and altogether upon the mutual intention and understanding of the parties existing from the beginning*—a most difficult question of fact, which must be affirmatively pleaded by the defendant, who thereupon assumes the burden of proof.

In not one of the cases cited in the opinion of the Circuit Court of Appeals has any court assumed or imputed an intention which all the parties to a transaction have disclaimed.

SPECIFIC CRITICISMS.

First. In searching the record for evidence of an intention to gamble, the opinion quotes from the principal brief of petitioners' counsel the language in which they attempted to formulate the terms of the contract of employment between petitioners and their agents, Schwartz, Dupee & Company.

It is to be noted in the first place that this does not involve *any conduct of the parties or course of dealing between them, and could not, therefore, be a fact or circumstance from which an inference of intention could be evolved.* More particularly is it to be noted that it was simply an attempt *on the part of counsel* to formulate in words what any authority to deal on the stock exchange, in pursuance of its customs and regulations must include; in other words, it was an attempt to explain the *rationale* of the daily novations and substitutions made in pursuance of the rules.

Our language was, perhaps, not as clear as it should have been. We have attempted in this application a similar explanation but in different language. We have shown, we

hope, that these daily novations and substitutions do not involve any element of risk, can not by any possibility result in loss or gain, injury or advantage to the person consenting to them, do not absolve the parties from their obligation to deliver or receive the number of shares contracted for at the time specified, do not transmute a contract for absolute sale into an option or privilege contract, do not, in short, afford any motive or inducement, so far as individual interest is concerned, to *consent* to such mutations and novations, and that *the only possible object is to accommodate the stock exchange as an institution, and to make easy its bookkeeping and the transaction of its business.*

Second. The opinion refers to the correspondence between the petitioners and their brokers where the former make inquiries concerning the "difference" demanded to change to August account, and the change is then ordered and reported as made by allowing the "difference."

These messages were sent on the 25th day of July. It will be observed that the first message was a direct order to change to August account at 2½ with the added phrase: "If you can not do it, let us know at once.

The next message, sent the same day states:

"You sent us the difference this morning at 2½. At what difference can you do it now?"

On July 27th the petitioners ordered their brokers, as follows:

"Change 200 more Diamond Match at two per cent or better."

And on the same day the brokers wired petitioners as follows:

"We changed the 200 match at 2½ difference. Will give you PRICE later."

Now what does this mean?

Every broker in the world knows that it does not have the meaning which the opinion of the Circuit Court of Appeals would bestow upon it. Indeed, the very language of the telegrams militates against the inference the Circuit Court of Appeals would make.

These telegrams show:

1. That instead of being compelled, according to the terms of their contract, to deliver the stock on the 31st day of July, the petitioners wished to have the time extended to the 31st of August.

What inference would a jury make from this request? If the petitioners recognized no obligation to deliver on the 31st of July why should they manifest any desire to have the time extended to August 31st? If they knew the purchaser was not required to accept, why should they expect compensation for extending the day of delivery?

2. The telegrams not only indicate a willingness on the part of petitioners to postpone the day of delivery, but they manifest a desire on their part to receive compensation for the accommodation. What inference would a jury draw from this? Why expect pay for an accommodation if there was no obligation?

3. The telegrams even indicate the price that petitioners were willing to receive for the accommodation, and the word "difference," used by the petitioners, is simply synonymous with the word "price." They might just as well have inquired on what terms, or at what price could the accommodation be obtained; but they express themselves in terms of percentages. Even their telegram, "Change the five hundred at two cents or better," meant two per cent or better.

It was in reference solely to the cost or price of the accommodation which they were willing to extend that the

word "difference" was used. Is not this obvious from the telegrams?

4. If the privilege of postponing acceptance to August 31st had not been granted by the petitioners, or if the price offered for the accommodation had been less than petitioners were willing to accept, what, presumably, would have been the result? Clearly the petitioners would have been obliged to make delivery on the 31st of July, and the purchasers, whoever they might be, would be obliged to accept the shares tendered or take the consequences of their breach of contract.

5. But if petitioners had instructed their agents to close out the deal absolutely, and settle according to "difference in price," this would afford very slight inference that the original intention of the petitioners, to say nothing of the intention of the first purchaser or the ultimate purchaser, or any intermediate purchaser, was to gamble, and no inference whatever that the original understanding and agreement was to settle in differences.

A thousand and one contingencies can be surmised that would make this the wise and proper course to pursue.

6. The fact remains, however, that the contract was not settled by the payment of differences, but that the time of delivery was extended to the 31st of August, and that the petitioners received a consideration for the accommodation.

Third. The opinion further states that there is neither averment nor pretense that the petitioners had or controlled any shares of the stock, or procured, or intended to procure, the same for delivery.

What rule of pleading makes *proper*, much less *requires* the allegation in a bill that at the time of entering into a contract for sale plaintiff was the owner of the subject-matter of the contract, or had means of procuring the same,

or intended to procure the same? Is not this transposing the onus of proof?

According to the Circuit Court of Appeals' implication the demurrer to petitioners' bill should have been sustained for lack of these allegations; but if the law starts out with the presumption that the contract was lawful it must, of necessity, include the presumption that the petitioners either had the stock, or could procure it, or intended to procure it, for delivery. Can an inference of unlawful intention arise from the absence of testimony showing affirmatively a lawful intent?

Fourth. The opinion further states that "it is conceded that they (petitioners) had no stock at any time in the hands of their brokers, and no property in the stock of which pretended tender and sale was made after the alleged default."

First protesting that no inference of unlawful intent is warranted from this alleged fact, and further protesting that the testimony does not show but that the petitioners had the shares of stock in New York, we make bold to assert that the statement does not conform absolutely to the testimony. That petitioners' brokers had the stock ready to be delivered at any time, is a reasonable inference from the fact that it was furnished on the day of delivery; that this stock was at the command and disposal of the petitioners is also reasonably inferable from the fact that it was tendered in their behalf to the respondents, Jamieson & Company, and by the all-important fact that when tender was made the title to the stock vested then and there, *eo instanti*, in the respondents, Jamieson & Co. *Thenceforth it was their stock*, to be held by the petitioners or their brokers, subject to respondents' orders on complying with their contract, or to be sold by petitioners or their brokers as *quasi* agents of the respondents, and the proceeds applied on account.

Fifth. The opinion refers to the rule of the stock ex-

change making distinct provision for closing contracts by paying the difference in market price, and further states that the contract in question was made with reference to such rule and by parties unquestionably acquainted with it, and from this rule itself the Circuit Court of Appeals infer an understanding of the parties that only a settlement of differences in price was contemplated.

We submit that the rules of the stock exchange should be construed together, and, if possible, they should be construed as contemplating the transaction of lawful business.

Art. 15, Sec. 1, provides: "Any member who fails to comply with his contracts, or becomes insolvent, shall be suspended until he has settled with his creditors," etc.

Article 17, Sec. 1, provides as follows:

"No fictitious sales shall be made. Any member contravening this section shall, upon conviction, be suspended by the governing committee."

Section 2 provides:

"Any member who shall make fictitious or trifling bids shall, upon conviction, be subject to suspension, or such other penalty as the governing committee shall impose."

Article XVIII provides:

"In all deliveries of stocks, bonds, etc., the party delivering shall have the right to require the purchase money to be paid at the time and place of delivery."

Article XXIX provides:

"Any member of this exchange who is interested in, or associated with, or whose office is connected directly or indirectly by wire or other method or contrivance, with any organization, firm or individual engaged in the business of dealing in differences or quotations on the fluctuations in the market price of any commodity or security, without a *bona fide* purchase or sale of said commodity or security, in

a regular market or exchange, shall, on conviction thereof, be deemed to have committed an act or acts detrimental to the interest and welfare of the exchange."

Article 4 of the BY-LAWS provides:

"*No sale of securities shall be made on which a deposit shall be offered as the limit of liability.*" * * *

Article 7, Sec. 1, provides:

"All deliveries of securities must be made between 11 A. M. and 1:30 o'clock P. M., or the buyer may demand that they shall lie over until the next day without interest, when they shall be delivered before 10:30 o'clock A. M., and when deliveries are not made at that time the contract may be closed under the rule after due notice to the defaulting party, as provided in Art. XVII of the by-laws. * * *

In the absence of any notice or agreement, the contract shall continue without interest until the following day, when the same rule shall apply. In every case of non-delivery, however, the party in default shall be liable, in addition, for the damages that may accrue."

Article XVII provides:

"Should any member neglect to fulfill his contract on the day it becomes due, the party or parties contracting with him shall, after giving notice as required by Sec. 2 of the preceding article, employ an officer of the board to close the same forthwith in the exchange by purchase or sale, as the case may require, unless the price of settlement has been agreed upon by the contracting parties. In case of a failure of a creditor to close the contract as above, the price shall be fixed by the price current at the time such contract ought to have been closed under the rule. In all cases where an officer may be directed to buy or sell securities under this rule, the name of the member defaulting, as well as that of the member giving the order shall be an-

nounced. No order for the purchase or sale of securities under this rule shall be executed unless made out in writing over the signature of the party giving the order, who shall state the reason therefor; and it shall be the duty of the officer who executes the order to indorse thereon the name of the purchaser or seller, the price, and the hour at which the contract is closed, and hand the same to the secretary of the board, who shall within twenty-four hours, ascertain whether the party for whose account the order was given has paid the difference, if any, arising from the transaction; if not, the secretary shall report the default to the president. The duty devolved upon the officers of the exchange under this rule shall be performed without charge. No party shall be permitted to supply offers to buy or sell securities closed for his account under the rule; and when a contract is closed under this rule, any action of the defaulter, direct or indirect, by which the prompt fulfillment of such contract is delayed, hindered or evaded, to the detriment of the other contracting party, shall subject the offending party to suspension for not less than thirty days, in the discretion of the governing committee, by a vote of two-thirds of the members present at the meeting. When contracts are closed out under the rule, any member supplying the bid or offer, and not duly receiving or delivering the stock, as the case may be, renders himself liable to prosecution under this article. Should any stock thus sold not be delivered until the next day, the contract shall continue, but the defaulting party shall be liable to pay such damage as may be assessed by the arbitration committee," etc.

Tr. p. 125. Under CLEARING-HOUSE RULES, Sec. 2 provides:

"Deliveries of cash stock or transactions for 'the account' shall be made on the last day of each month. Provided,

however, should the last day of any month occur on a holiday, or on a day when the exchange is closed for business, then in that case deliveries shall be made on the first day *preceding.*"

Sec. 6 provides: Tr. p. 128.

"Stock balances, as shown by the statements, rendered for cash settling days, must be delivered and paid for at the closing bid price of the previous day, as per manager's notices, before 1:30 P. M. Provided, however, if satisfactory evidence is shown the clearing house committee that the cash stock is on hand in New York, or in transit for Chicago, three days' grace will be given the seller to make the delivery with interest, failing in which the clearing house committee shall cause to be purchased for account of delinquent, said stock, in whichever market in their judgment seems best; and the party so failing to deliver shall be held responsible for all loss or damage arising therefrom; but when a failure to receive or deliver occurs, nothing in these notifications shall be construed to relieve the last contracting parties to the transaction from the liabilities to each other."

Section 8 provides:

"Whenever a member is unable to meet his contracts or transactions made for 'the account,' he shall make a statement of his transactions, to be audited that day, and deliver it to the manager or presiding officer of the exchange."

Section 10 provides:

"The same rule as to notice, time and place, that govern defaults in other contracts shall apply to transactions for 'the account.'"

The inference made by the Circuit Court of Appeals from the rule quoted by them would reduce the foregoing rules prohibiting fictitious sales, and denouncing penalties for

their violation, to a mere *brutum fulmen*. The opinion of the Court of Appeals practically finds as a fact that the rules of the stock exchange *contemplate only* gambling transactions and *require* parties to settle by payment of differences; *for if the rule in question, while affording facilities for gambling, gives equal facilities to those lawfully inclined to prosecute their bargains to a lawful conclusion, no inference of gambling ought to be drawn from the rule itself.* THE RULE WOULD AFFORD NO BASIS FOR INFERENCE OF INTENTION ONE WAY OR THE OTHER.

But we respectfully insist that the honorable court misapprehended the meaning and purpose of the rule. *It purports to provide a remedy* FOR THE BREACH OF CONTRACT *by any member of the exchange and fixes a penalty for such breach.*

In this respect it differs in no wise from a great many important contracts entered into between individuals. It is a most just rule. The measure of damages which it prescribes for breach of contract is precisely the measure of damages which the law itself would prescribe.

The members of the stock exchange could not assume that every contract made upon its floors would be faithfully observed. They were, on the contrary, bound to assume that contracts would be broken *and if they assumed this they had a right, for the internal harmony and autonomy of their institution, to prescribe what, according to their sense of justice, should be the penalty or measure of damages, and in determining what this measure should be they copied from the law.*

To infer, *as a matter of fact,* an original understanding and agreement of the parties to settle their contracts by the payment of differences in price, simply because the rules prescribe that upon breach of contract the party breaking the contract shall pay certain damages (and these

damages precisely the same as the law would inflict) *is, we submit, to infer an unlawful intention from a lawful act.*

The rule which the honorable court evidently had in mind is article 17 of the by-laws. It starts out by saying:

"*Should* any member neglect to fulfill his contract *on the day it becomes due,*" etc. Would it not be inferred from this language that the member was ordinarily *expected* to fulfill his contract?

The rule further says: "Should any stock thus sold *not be delivered until the next day* the contract shall continue, but the defaulting party shall be liable to pay such damages as may be assessed by the arbitration committee."

Why talk about the delivery of stock if no delivery of stock is contemplated by the rule?—if they are dealing in figments or abstract numbers?

But, as already observed, these rules are only intended for the discipline of the members, who alone are permitted to deal upon the floor of the exchange, but who, in nearly every instance, are dealing not for themselves, but for others.

Sixth. The language of the opinion shows a misapprehension of the word "option," and of the purposes of the Illinois statute declaring that:

"Whoever contracts to have or give to himself or another *the option to sell or buy* at a future time any grain or other commodity, etc., * * * shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year or both; and all contracts made *in violation of this section* shall be considered gambling contracts, and shall be void." (1 Starr & Curtis An. Stat., 2d Ed, pp. 1293, 1298, Sec. 130.)

Now, we take it that no contract which *on its face* purports to be a contract for the sale of a commodity to be delivered

at a future time *certain* has ever been called an option contract. The statute was aimed at "puts" and "calls."

See *Pixley* v. *Boynton*, 79 Ill. 351, which also defines these terms as follows: "A 'put' is a *privilege* to deliver or not deliver grain or other commodity; a 'call' is a *privilege* to call or decline to call for such delivery."

It must be obvious that the "privilege" here spoken of is not the mere privilege *to break a contract*, for that "privilege" inheres in every contract—with certain legal penalties for the exercise of it; but the privilege meant is the privilege to deliver or not to deliver, to receive or not to receive, *without a breach of contract;* in other words, THE "PRIVILEGE" IS THE VERY THING CONTRACTED FOR.

That such a contract would be valid at common law goes without saying. A contract to gamble in difference of price, however, would now-a-days require no statute to render it void. Therefore the language quoted in the opinion from *Schneider* v. *Turner*, 130 Ill. 28, to the effect that something more was intended by the legislature than the prohibition of gambling is eminently correct.

As already observed, the legislature had in mind the option contracts known as "puts" and "calls," but the effect of the statute has been more far-reaching, perhaps, than the legislature contemplated.

For instance, if a manufacturer, expecting a large order for goods, should go to a coal merchant and make known that in a certain contingency he would want a large amount of coal, but in another contingency he would not need any, and should enter into a contract with a coal merchant, for a consideration in hand paid, to take a certain amount of coal at a particular date *or not, as he might elect*, the common law would sustain the contract, for the motive which inspired it would be worthy and the consideration paid for the option

25225

presumably adequate. But just such a contract has been pronounced void under the Illinois statute.

See *Corcoran* v. *Lehigh & Franklin Coal Co.*, 138 Ill. 390.

If a clothier, for a consideration in hand, should agree to deliver a suit of clothes to a customer on or before Monday next, would it be pretended that such a contract is obnoxious to the Illinois statute against options? Or if, at the time appointed for delivery, the merchant should wait upon his customer and desire an extension of the time till the following Monday, agreeing in consideration of such extension to a reduction in the price, would it be contended that such a contract was obnoxious to the Illinois statutes against dealing in options?

Says Chief Justice SCOTT, in *Pixley* v. *Boynton, supra*, of a contract for delivery "on or before" the last day of July:

"Under such a contract, as we understand the evidence, all the option the seller has is the privilege to deliver the grain at any time before the maturity of the contract. This is nothing more than a time contract, which is regarded on the board of trade and elsewhere as a legitimate and regular contract. Time contracts in relation to grain, as well as other commodities, are of daily occurrence, and must necessarily be in commercial transactions. * * * The contract between the parties to this transaction was not an optional one, in the sense of 'puts and calls.' The only option the seller had was as to the time of the delivery. The legal effect of his agreement was that he should deliver the grain contracted to be sold within a limited period."

In the case at bar there was not even an option as to time of delivery. The stock was not required to be accepted

before the August account day, which was the last day of the month.

The case of *Schneider* v. *Turner*, 130 Ill. 28, was clearly an option contract. The written contract was as follows:

"Chicago, November 11, 1885.

In consideration of one dollar ($1.00) and other valuable considerations, receipt of which is hereby acknowledged, I hereby agree to sell to George Schneider, Walter L. Peck and Ferd W. Peck, seventeen hundred and eighty-six (1786) shares of the capital stock of the North Chicago City Railway at six hundred dollars ($600) per share, *if* taken on or before the 15th day of December, 1885.

(Signed) V. C. TURNER."

Nowhere in this contract is there a promise on the part of Schneider et al. to take the shares at any time. If they exercise the privilege before the 15th day of December, 1885, the seller undertook and agreed to deliver a certain number of shares at a certain price. But that it gave Schneider *et al.* an option *to buy or not, as they might elect*, seems too plain for discussion.

It was contended by the appellant that the contract was an executory contract of sale and on the part of the appellee that it created a mere option. The court say, p. 36:

"Looking at the instrument itself, it seems impossible to give it the construction contended for by appellants, without violating plain and well-settled rules of law applicable to all instruments in writing. * * * The construction contended for ignores the first clause of the instrument entirely, and gives to the word 'if' in the last sentence, an entirely different meaning from that ordinarily attached to it, thus making the contract in effect read, 'I hereby agree to sell to George Schneider, Walter L. Peck and Ferdinand W. Peck 1786 shares of the capital stock of the North Chi-

cago City Railway stock, at $600 per share, to be taken (or they to take the same) on or before the 15th day of December, 1885.' *So read, it would undoubtedly under the authorities cited, be an absolute contract of sale of the shares of stock.* * * *

The plain, unambigious meaning of the contract (treating it as such) is, that appellants paid appellee a valuable consideration for the refusal or privilege to buy 1,786 shares of stock of the North Chicago City Railway Company at $600 per share, at any time on or before the 15th of December, 1885—a contract heretofore of frequent occurrence in commercial transactions, perfectly legal and enforceable at common law. In the absence of section 130, no one, it seems to us, would hesitate to pronounce this a contract to give to appellants the option to buy railroad stock at a future time."

This identical section of the Illinois statute was passed upon by this court in *White* v. *Barber*, 123 U. S. 392. The syllabus of the case reads as follows:

"A *bona fide* contract for the actual sale of grain, deliverable within a specified future month, the only option which is an option in the seller to deliver it at any time within such month, is not a gambling contract, within the meaning of Sec. 130 of Chap. 38 of the Revised Statutes of Illinois. (Hurd's Ed. of 1883, p. 394; do. of 1885, p. 405.)

"W claimed to recover from B, by a suit in equity, money which he had put into the hands of B, as a broker, to be used by him in transactions which W alleged were wagering contracts, because they were sales of wheat in regard to which both W and B did not intend there should be any delivery of the wheat: Held, that what W did in connection with the transactions was inconsistent with such claim; that B had no such understanding; that the sales of wheat

were lawful; and that W was not entitled to recover the money which B had paid out.

"B having paid out the money in settlement of the sales according to the rules of the board of trade of Chicago, was not a "winner" of the money from W, within the meaning of Sec. 132 of Chap. 38 of the Revised Statutes of Illinois. (Hurd's Ed. of 1883, p. 394; do of 1885, p. 405.)"

STARTING WITH THE PRESUMPTIONS THAT THE PARTIES WERE INNOCENT OF AN UNLAWFUL INTENTION, AND THAT THE MACHINERY OF THE STOCK EXCHANGE CLEARING HOUSE WAS DEVISED FOR THE PURPOSE OF FACILITATING LAWFUL EXCHANGES; AT WHAT STAGE OF THE TRANSACTION DID IT BECOME EVIDENT THAT THE PARTIES INTENDED TO GAMBLE, AND WHEN AND WHEREIN DOES IT APPEAR THAT THE MACHINERY OF THE CLEARING HOUSE WAS INADEQUATE TO CONSUMMATE A LAWFUL CONTRACT IN LEGAL AND PRACTICAL EFFECT AS CONTEMPLATED BY THE PARTIES, AND AT WHAT STAGE OF THE PROCEEDINGS WAS THE CONTRACT OF SALE AND PURCHASE ABSOLUTE CONVERTED INTO AN OPTIONAL CONTRACT TO SELL OR NOT TO SELL AT THE ELECTION OF THE PARTIES?

A brief analysis of the transactions from July 16 and July 20, 1896, to August 3, 1896, will show that the intention of the parties was throughout lawful and the contract of sale absolute.

First. In entering into the contract of August 3, 1896 (the contract here sued upon), is there any proof in the record that either Schwartz, Dupee & Company or Jamieson & Company intended to gamble?

1. There is nothing on the face of the contract to indicate such an intention.

2. Neither party to the contract has testified in the case that such was his intention.

3. No such claim has been made even in the pleadings.

4. Such an intention would overthrow the legal presumption of innocence and ought not, therefore, to be indulged in the absence of testimony.

5. Being both members of the stock exchange, Schwartz, Dupee & Company and Jamieson & Company would be presumed to have contracted with reference to its rules, and an intention to gamble would contravene the rules and make the offenders liable to expulsion.

6. Furthermore, Jamieson & Company and Schwartz, Dupee & Company *were not contracting on their own behalf;* they were each representing undisclosed principals. In making themselves liable for such undisclosed principals, they had presumably taken the precaution to protect themselves against loss by requiring ample security. IF IT WAS THE *bona fide* INTENTION OF THEIR PRINCIPALS TO BUY AND SELL, THERE COULD NOT BE, IN THE NATURE OF THINGS, AN INTENTION ON THE PART OF THE AGENTS TO GAMBLE.

7. And even if their principals intended to gamble, it would not follow that their brokers. making themselves individually liable on their principals' account, would share such intention; for it would not only violate the rules of their organization and so make them liable to expulsion therefrom, *but it would vitiate their security, making them liable for any money of their principals lost in the transaction.*

8. So far as the intention of Schwartz, Dupee & Company and Jamieson & Company is concerned, *it would obviously not be to their interest, in any aspect of the case, to gamble.*

Second. Did W. H. & J. H. Moore, for whom Jamieson & Company claim they were acting, intend to gamble? Neither of the Moores was a witness in the case, nor was it claimed by Jamieson & Company on their behalf that they, or either of them, intended to gamble.

We have in the answer of Jamieson & Company the simple assertion that in the contract of August 3d they were acting for W. H. & J. H. Moore. We have in evidence the bare fact that when tender of stock was made to Jamieson & Company on the 31st of August, they refused to receive it because the Moore Brothers, for whom they had acted, would not receive it from them. Why the Moore Brothers would not receive it is a matter of conjecture. There is certainly no evidence that they, or either of them, intended to gamble.

Third. Did any intermediate purchaser between July 16th and August 3d, intend to gamble? The names of these persons could not be traced except from examination of the private books of the brokers. The result of such examination was stipulated into the record and can be found on page 66, *et seq.*, of the transcript. No person named in this stipulation was examined as a witness, or his intention sought to be discovered. There is, therefore, no evidence that any intermediate purchaser intended to gamble.

Fourth. Did Henry Clews & Company intend to gamble? Their intention in the premises has not been made an issue in the case; no member of the firm was called as a witness; no other witness was interrogated on the point. So far as *oral* testimony is concerned, there is no evidence of an intention on the part of Henry Clews & Company to gamble.

Fifth. Was there any circumstance developed in the testimony from which an intention of Henry Clews & Company to gamble could be reasonably inferred—any course of dealing covering any period of time, anything in the financial status or usual business of the petitioners that would make a transaction of the kind incongruous? The testimony shows that the usual and ordinary business

of the petitioners was the buying and selling of corporate stocks; that they should have sold the particular stock, therefore, was neither suspicious nor out of character. Whether at the time of making the sale they actually owned the stock to answer to it, does not appear; and we respectfully submit that it does not matter. That they had the means of procuring the stock is pretty evident from the fact that it was tendered, and that the title thereto when tendered passed to Jamieson & Company. Indeed, it was one of the duties of their brokers, Schwartz, Dupee & Company, under their contract of employment, to furnish the stock in the first instance.

See *Markham* v. *Joudon*, 41 N. Y. 235–239.

Was it the original intention of Clews & Company not to deliver the stock, even though they might own or control it? The evidence is likewise silent on this point, and as a mere *ex parte* intention likewise immaterial. BUT THAT THERE COULD BE NO MUTUAL UNDERSTANDING AND AGREEMENT BETWEEN CLEWS & COMPANY AND ANY PURCHASER, MEDIATE OR IMMEDIATE, ORIGINAL OR ULTIMATE, NOT TO DELIVER THE NUMBER OF SHARES CONTRACTED FOR, IS ABSOLUTELY CERTAIN, FROM THE FACT THAT HENRY CLEWS & COMPANY DID NOT EVEN KNOW WHO SUCH PURCHASERS WERE OR MIGHT BE.

Sixth. Was there, then, anything in the documentary evidence or the rules and customs of the stock exchange which indicated an intention to gamble? Let us commence at the beginning.

On the 16th day of July, 1896, petitioners wired their brokers, Schwartz, Dupee & Co., as follows:

"Sell 500 Diamond Match at 220½ for account."

On the same day Schwartz, Dupee & Co., notified the petitioners as follows:

"Sold 500 Diamond Match at 221⅛ for the account."

To whom was this sold? Petitioners were not at the time advised, but they *were* advised that a contract had been entered into on their behalf whereby they contracted with *somebody* to deliver to him on the last day of July, 1896, 500 shares of Diamond Match stock for $221.12½ per share.

Tr. p. 104. *And it is stipulated that such a sale was made.*

Stopping at *this* point, and in the absence of any other testimony, what is to be said of this contract? Is it *prima facie* illegal?

One thing certain, it is not a contract for a *privilege* or an *option*. It *obligates* the petitioners *to deliver* a certain number of shares to the contractee at a certain time and at a certain price. If it is *prima facie* illegal, *so is every other contract for future delivery.*

Does the contract indicate an intention to gamble? Would any court permit a jury *to infer a mutual understanding and intention* of the parties *not* to deliver or receive the shares contracted for from the terms of a contract which said they *must?*

But the question recurs, at *what point* in the history of this transaction *did it become evident* that the *original intention* of the petitioners was to gamble? Or when was the *absolute* contract for sale converted into an *optional* contract to sell or not to sell?

CERTAINLY NOT ON THE 16TH DAY OF JULY. DURING TWENTY-FOUR HOURS, THEREFORE, THE CONTRACT APPEARED TO BE BOTH LEGAL AND BINDING.

Let us proceed to the day following, when we will assume that there was substituted by the manager of the stock exchange for the original contractee a new purchaser at a lesser price.

Nobody will contend that ordinarily the petitioners or their agents would be *bound to consent* to this substitution.

25229

Ordinarily, and according to the conventional contract, the parties would remain the same *to the end*, in which event, we venture to say, the Court of Appeals would not have branded the contract as unlawful or the parties to it as amenable to the criminal code.

But (and to this question, so it seems to us, the whole controversy has reduced itself) *would the consent of the petitioners to the novation of the contract and the substitution of a new contractee render it illegal? If so, why? If the original contract indicated no intention to gamble, what element in the new contract would indicate such an intention?* Petitioners certainly had a right to make the novation if their contractee would assent to it.

Whether either party could be *induced* to consent to the novation would depend entirely upon circumstances.

The manager of the stock exchange clearing house, in whom is vested plenary authority to make these substitutions, makes them according to the *number* of shares sold, without reference to the *price*. It is an immense service *to him* in keeping books and in effecting exchanges.

He therefore, we will say, undertakes to substitute for A (the original purchaser), B, *who has purchased a like number of shares*. B, however, instead of purchasing his shares at 221⅛ agreed to take them, we will say, only at 220. *He would not consent, therefore, to be substituted under a contract that called for the payment of* 221⅛ *per share, nor could the seller be expected to accept as a substitute some one who agreed to pay only 220 per share.* But if the substitution is to take place, *if this great advantage in bookkeeping and facilitating exchanges is to be realized,* some method *must* be devised whereby petitioners will be willing to accept B, and B will be willing to accept petitioners.

Obviously this can only be done by *equating* the prices.

If this is done the parties can have no reasonable excuse for withholding their consent. It would be a distinction without a difference. Neither party would be *benefited*, neither party would be *injured;* neither party would *make* a cent, neither party would *lose* a cent, by the transaction. THE ONLY POSSIBLE BENEFIT, THEREFORE, WOULD BE TO THE EXCHANGE ITSELF AND THE ONLY POSSIBLE OBJECT WOULD BE THE AVOWED OBJECT OF FACILITATING BOOKKEEPING AND EXCHANGES.

Surely this object is not an unlawful one.

What we are in search of, however, is evidence of an intention to gamble, and this the Circuit Court of Appeals affect to find, *not in prior dealings of the parties* (for, so far as the testimony reveals, this was the only transaction ever had between them), *not in the original contract itself* (for that was absolute and unequivocal for the sale of a number of shares of stock at a certain price at a certain time), but in the subsequent mutations of the contract growing out of the rules and customs peculiar to the stock exchange, *involving no risk to the petitioners, no possibility of gain or loss to them, modifying in no essential particular the original purpose of the petitioners, affording no motive or object to the petitioners to assent to them except the motive to accommodate the exchange itself.*

Respectfully submitted,

LOWDEN, ESTABROOK & DAVIS,
Counsel for Petitioners.

HENRY D. ESTABROOK,
Of Counsel.